REPORTS OF CASES

DECIDED BETWEEN

AUGUST 20, 1960 and MARCH 17, 1961

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1960 and JANUARY TERM 1961

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WALTER D. JAMES

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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1 Term expired January 4, 1961
2 Died March 3, 1961
3 Term expired January 4, 1961
4 Term began January 5, 1961
5 Term began January 5, 1961
6 Appointed March 13, 1961
7 Term expired January 4, 1961
8 Term began January 5, 1961

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee, and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe, and Sarpy.	John M. Dierks	Neb. City
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		Herbert A. Ronin	Lincoln
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		John E. Murphy	Omaha
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		John D. Zeilinger	York
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		George W. Dittrick	Norfolk
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Twelfth	Buffalo, Custer, Logan, and Sherman.	S. S. Sidner	Kearney
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		Clarence S. Beck	North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	William C. Smith, Jr.	Ainsworth
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Albert W. Crites	Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff.	Ted R. Feidler	Scottsbluff
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1960

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN P. JENSEN, RESPONDENT.

105 N. W. 2d 459

Filed October 14, 1960. No. 34487.

1. **Continuances.** An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion.
2. **Trial: Judgments.** Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled.
3. **Attorney and Client.** A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.
4. ———. Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto.
5. ———. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. That is, the court should be satisfied to a reasonable certainty that the charges are true.
6. ———. The oath taken by a lawyer, as required by statute, requires him to faithfully discharge his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar.

7. ———. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.
8. ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.
9. ———. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
10. ———. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state.
11. ———. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment.
12. ———. Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.
13. ———. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law.
14. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.
15. **Attorney and Client.** In a disciplinary action against an attorney the referee is charged with the duty to determine the truth, and has the right to question witnesses on both sides of the litigation to reach a determination as to the true facts, and by doing so such referee has not committed error.
16. **Attorney and Client: Divorce.** Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as

against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship.

17. Attorney and Client. The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

18. Witnesses. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

19. ———. While the plaintiff who calls defendant as a witness cannot impeach his character for veracity generally, the plaintiff may show that the whole or any part of what defendant has sworn to is untrue either by his own examination and the improbability of his story or by other contradictory evidence material to the case.

20. Equity. Laches is an equitable doctrine and it does not result from the mere passage of time.

21. Attorney and Client: Equity. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense.

22. Constitutional Law. The term "due process of law" has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs, and is satisfied by a proceeding applicable to the subject matter and conformable to such general rules as affect all persons alike.

23. ———. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

24. Courts: Attorney and Client. Each state has complete control over the remedy which it offers to suitors in its courts. The bar committees are clothed by rule with the power to make investigations and to hold hearings in order to determine whether the facts are supported by credible evidence and whether or not such facts are sufficient to warrant the institution of a proceeding to discipline or disbar an attorney.

Original action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for relator.

Joseph T. Votava, Paine & Paine, and *John P. Jensen,* for respondent.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, relator, against John P. Jensen, a lawyer duly admitted and licensed to practice his profession in this state. On the filing of the complaint the matter was duly referred to a referee for hearing, report, and recommendation. Hearing was had, report made, and the referee found the respondent guilty of unethical and unprofessional conduct. The referee made no special recommendation, but left the matter of discipline to this court. Exceptions were taken by the respondent to both the referee's findings of fact and the recommendation.

The duty rests on this court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice. We necessarily review the evidence adduced in such proceedings de novo to determine if discipline should be imposed, and, if it should, the extent thereof. See State ex rel. Nebraska State Bar Assn. v. Fisher, 170 Neb. 483, 103 N. W. 2d 325.

Prior to setting forth certain principles which are applicable in disciplinary proceedings, we make reference to certain motions and stipulations filed in this court which motions this court has not ruled upon or disposed of.

On December 24, 1958, there was filed in this court a stipulation wherein the parties, pursuant to an oral agreement made December 5, 1958, and concurred in by the referee, agreed that this cause be set for hear-

ing before the referee on April 20, 1959.

On January 17, 1959, the parties stipulated that all of the evidence taken before the Committee on Inquiry on July 18, and August 6, 1957, all of the evidence offered at the hearing before the Advisory Committee on May 23, 1958, and all depositions taken by either party since these proceedings were filed in this court might be offered and received in evidence the same as if said witnesses were present in court and testified, all subject to the objections as to relevancy, competency, and materiality.

On March 23, 1959, by stipulation of the parties, it was agreed that the relator's objections to the respondent's request for admissions, and relator's objections to respondent's request for interrogatories previously filed in the office of the Clerk of the Supreme Court March 11, 1959, and noticed before this court for hearing on April 6, 1959, might be submitted to the referee for hearing and determination instead of to this court, at such time and place as the referee might determine or designate.

On February 28, 1959, the respondent served request for interrogatories and request for admissions on counsel for the relator. The requests for interrogatories and admissions were of great length and contained certain subparts. The relator made response to some of the requests, a part of which were denied for the reasons stated therein, and the balance were objected to. Such objections were sustained by the referee on April 10, 1959.

On April 17, 1959, respondent filed a motion in this court that this court enter an order holding that the responses of the relator, in legal effect, constituted admissions by the relator of the requests of the respondent and might be relied upon by the respondent as admissions of the relator.

On April 17, 1959, the respondent filed a motion requesting this court to review the order of the referee

as to objections to request for interrogatories and request for admissions, and to rule on the question as to whether or not the respondent was entitled to discovery by request for admissions to interrogatories as provided for in sections 25-1267.37 to 25-1267.39, R. R. S. 1943. The above motions were noted for hearing before this court and were not ruled on for the reason that the matters contained therein were referred to and were before the referee for determination.

Under the circumstances, the motions of the respondent filed in this court on April 17, 1959, were not timely filed and are hereby overruled.

The requests for admissions, which were objected to, were responded to by the relator in good faith as contemplated by section 25-1267.41, R. R. S. 1943. The denied parts were honestly set forth and the reasons given why the relator could not truthfully admit or deny the matter in compliance with subdivision (1) of said section. The trial before the referee proceeded on the theory that such responses were adequate, and evidence was introduced for and against the matters the respondent now seeks to have conclusively established. The respondent's objections should have been directed to the referee.

In the light of the foregoing, we find that the respondent was in no way prejudiced.

On April 17, 1959, the respondent filed a motion in this court for summary judgment. The respondent also moved for a continuance before the referee of this matter until such time as a motion for summary judgment had been ruled upon and until such time as a number of other motions also filed in this court had been ruled upon, and for other reasons not necessary to mention. This motion was overruled.

An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse

of discretion. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

The referee being an arm of the court, his actions providing for and holding a hearing are controlled by the rules relating to such proceedings in a court. The referee therefore did not err in denying a continuance.

With reference to the motion for summary judgment, respondent states that there have been no counter showings filed by the relator, therefore it must be presumed that the showings attached to the motion for summary judgment have been accepted as correct by the relator. This motion was not ruled on by this court for the reason that the whole matter had been referred to the referee.

Section 25-1332, R. R. S. 1943, provides in part: "The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The complaint, the answer thereto, and the reply clearly show that there is a genuine issue of fact to be determined in the instant case, as well as other matters appearing in the transcript relating thereto. The motion for summary judgment is overruled. See Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614.

On July 3, 1958, the respondent filed a motion in this court that the charges made against him were indefinite and uncertain, and moved that the relator be required to make the complaint more definite and certain. The primary objection to the complaint was that there was a failure to set forth which specific canons of professional ethics the respondent violated, and to set forth what standard of professional conduct, rules or regulations, statutes and laws were vio-

lated by the respondent. On September 26, 1958, this court overruled the above motion.

Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 3, provides in part: "Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness."

In the case of In re Becker, 16 Ill. 2d 488, 158 N. E. 2d 753, it was held: "A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong, * * *." See, also, 7 C. J. S., Attorney and Client, § 31, p. 775.

There is no doubt but that the respondent knew the charge or charges he was defending against. We find no merit in the respondent's contention.

Considering the respondent's contentions, we set forth certain principles which are applicable in disciplinary proceedings.

"Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto." State ex rel. Nebraska State Bar Assn. v. Fisher, *supra.*

In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. See State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641. That is, the court should be satisfied to a reasonable certainty that the charges are true. See, Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 1; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474.

The oath taken by a lawyer, as required by section 7-104, R. R. S. 1943, requires him to faithfully discharge

his duties; uphold and obey the Constitution and laws of this state; observe established standards and codes of professional ethics and honor; maintain the respect due to courts of justice; and abstain from all offensive practices which cast reproach on the courts and the bar. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. See State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491.

A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice. See State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. See State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269.

The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment. State ex rel. Nebraska State

Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law. State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

While this case is for trial de novo in this court, we recognize the rule that the referee heard and saw the witnesses as they testified. He had a better opportunity to appraise the credibility of the witnesses than does this court. While this court tries appeals in equity de novo, we must necessarily consider the findings of the referee on matters that are in irreconcilable conflict. Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699; Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

The respondent complains that the referee unduly interrogated witnesses, and indicates that in interrogating the witnesses the referee did so unfairly and not impartially.

There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the questions of facts in issue. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

In this action the referee is the trier of facts. The referee is charged with the duty to determine the truth and has the right to question witnesses on both sides of the litigation, which he did. We find no error in the referee's action in such respect. In any event, all the evidence before the referee is before this court to review.

This action charges the respondent with unethical and unprofessional conduct in five separate matters. The answer is of extensive length and comprises a recital of facts in each charge to considerable extent. However, the answer to each charge may be considered as a denial of unethical or unprofessional conduct on the part of the respondent. The reply of the relator contains certain admissions of fact as pleaded in the respondent's answer and denies other facts appearing therein.

The record in this case is rather voluminous. Without repeating all the details and testimony of this lengthy record, we think the following résumé of certain salient, significant facts is sufficient to illustrate and substantiate our decision in this matter.

Paragraph V of the complaint charged the respondent with unethical and unprofessional conduct for failure to deliver the last will and testament executed by Lydia F. Evans and left by her in the respondent's possession after she had made repeated requests of him to deliver to her her last will and codicil attached thereto. The record shows that the respondent first became acquainted with Lydia F. Evans when he drew a will for her in April 1948. There was a petition for the appointment of a guardian filed in the county court of Buffalo County by her son Franklin F. Evans. An answer was filed to this petition on April 26, 1948. This guardianship proceeding was dismissed. The respondent transacted other legal business for Lydia F. Evans on occasions. Later, Lydia F. Evans obtained the will executed by her in April 1948, and destroyed it. Mrs. Evans had three children living, Martha Priebe, Galen Evans, and Franklin F. Evans, and three nephews living, Samuel M. Forney, Maurice May, and John May. Samuel M. Forney was an ordained minister of the Church of the Brethern, the same church Mrs. Evans attended. In January 1951, Samuel M. Forney made an appointment for his aunt, Lydia F. Evans, to

go the office of the respondent to make a will. Forney and the respondent picked her up in the respondent's car. Lydia F. Evans executed a last will and testament on January 22, 1951, and nominated the respondent as executor, giving him full power, at his discretion, to sell at public or private sale any real or personal property without order of the court, and to settle, compromise, or to adjust all claims, charges, and debts in favor of or against the estate. On February 8, 1951, Lydia F. Evans had the respondent make a codicil to her will. The respondent testified that at the time Lydia F. Evans executed the will of January 22, 1951, he wanted to know his specific instructions with reference to the will; that he did not want to be involved in a situation where anybody could come to his office and get the will; and that Lydia F. Evans' instructions to him were as follows: "Mr. Jensen, this I think is the last will that I will ever make. This will is to be kept by you. You are not to give it to anyone. I will not send anyone for it. And if I come up here with anyone, you are not to give it either to them or to me." It appears that the wills executed by Lydia F. Evans in 1948 and 1951 were quite similar. Both wills made provisions for charitable bequests to the church and church-related beneficiaries. Lydia F. Evans' nephew, Samuel M. Forney, was the residuary legatee under the will made January 22, 1951.

On or about January 27, 1951, Franklin F. Evans saw his mother, Lydia F. Evans, going to the respondent's office, so he followed her to the office. Mrs. Evans requested her will, but the lady at the desk told Mrs. Evans she could not give the will to her. Thereafter Franklin and his mother left the respondent's office. At another time, about a week or so later, Franklin F. Evans again saw his mother going to respondent's office, and he again followed her to the office. Mrs. Evans was talking to the respondent's law partner, and Franklin heard her ask for the will. She

received a copy of the will, and Mrs. Evans stated that she wanted the signed copy, but respondent's partner would not give her the original will.

On June 4, 1951, Lydia F. Evans filed a petition in the county court of Buffalo County alleging that she was 82 years of age and, by reason of age and health, she was unable to handle all her business affairs, to wit, the management of her property and the collection of rents, without a conservator to advise her and act for her in such matters, and alleged that her son Franklin F. Evans was a suitable person to act as such conservator. She was represented in such proceedings by the respondent and attorney Worlock. Franklin served as conservator of the estate of Lydia F. Evans until May 20, 1952, when, at her request, the conservatorship was terminated. On December 3, 1952, Worlock mailed the respondent a check for $150 as his part of the attorneys' fees collected in the conservatorship proceedings. There is no question but that the respondent knew and had notice of such proceedings and the manner in which the same were handled and concluded.

Franklin F. Evans testified that on September 14, 1951, he and his mother went to the respondent's office, and when they arrived at said office his mother said she wanted her will. The respondent shouted: "You're not fit to make another will," and he would not give up the will. He further said that he had the interests of other people to protect who were beneficiaries under the will; and that he could not give the will up without a court order. The respondent denied that he ever stated that he would not deliver the will because he had to protect the interests of other people who were beneficiaries under the will.

It appears that on September 14, 1951, both Franklin F. Evans and his mother asked the respondent for Mrs. Evans' will. The respondent testified that on September 14, 1951, when Franklin and Lydia F. Evans were in his office, Franklin was angry and wanted the respondent

to produce the will immediately and give it to his mother. Franklin said that she wanted it turned over to him. The respondent told Franklin that he did not believe, as conservator, Franklin was entitled to the will. The respondent said: "Aunt Liddy, * * * do you want me to give this son of yours this will?" She said: "Well, yes." She further said that Franklin told her if she would get the will and give it to him he would have it fixed so she could give her property to the people to whom she wanted to give it. There ensued some sort of argument and as a result Franklin F. Evans called attorney Worlock to come to the respondent's office. When Worlock arrived, the respondent, Lydia F. Evans, and Franklin F. Evans were in respondent's office. Worlock said: "John, why don't you give Mrs. Evans her will? She is entitled to it." Instead of answering Worlock directly, the respondent said: "Aunt Lydia, I am not going to give you this will. If I give it to you, you will destroy it; you will not be in a position to make another will, and I have the interests of these parties to protect, and I am not going to give you the will."

Worlock testified that he advised Lydia F. Evans to go to the respondent's office and ask for the will. After this conversation in the respondent's office on September 14, 1951, Worlock, on September 15, 1951, at Lydia F. Evans' request, prepared a revocation of the will of Lydia F. Evans dated January 22, 1951, and the codicil thereto. With respect to the revocation of the will, Worlock talked to Lydia F. Evans alone. She told Worlock that she wanted that will and codicil destroyed; that she did not want another will; that she wanted to revoke her will and the codicil thereto; and that she wanted her property to go to her children.

After the conversation had in the respondent's office between Franklin F. Evans, Lydia F. Evans, and Worlock, the respondent called Samuel M. Forney and told him that Franklin F. Evans had been to the respondent's office trying to get the will, and suggested that Forney

do whatever he felt necessary to protect the rights of Mrs. Evans, Forney, or anyone else. The respondent also called Maurice May and told him to do whatever was necessary to protect his rights relating to the will.

There is testimony by witnesses in behalf of the respondent that under the instructions given to the respondent by Lydia F. Evans it would have been wrong, under the circumstances, for the respondent to deliver the will to Lydia F. Evans.

Lydia F. Evans told her son Galen Evans that she had gone to respondent's office numerous times to get her will, and the respondent would not give it to her. Lydia F. Evans also told several of her friends during the summer of 1951 that the respondent would not let her have her will. She also told her daughter that the respondent would not give her her will and she wanted it back. She also requested her son Franklin to help her get her will back. Later Lydia F. Evans conveyed and transferred her property to her children.

On June 25, 1954, Lydia F. Evans died. The respondent filed a petition in the county court of Buffalo County July 3, 1954, for the probate of the will of Lydia F. Evans, deceased, executed on January 22, 1951. Objections were filed to the probate of the will, together with a copy of the revocation of the will and codicil, on July 30, 1954. Maurice May and the respondent filed a reply on May 11, 1955, showing Dryden and Jensen (the latter being the respondent), and Munro and Parker, as attorneys. The county court rendered judgment against the respondent, and an appeal was taken to the district court. The proponents were represented by attorneys Munro and Parker in the district court. The district court sustained the motion of the contestants against the proponents in part, and instructed the jury that the mental capacity of Lydia F. Evans at the time of the execution of the revocation of her last will and testament had been established by the evidence, and limited the issue in the case to undue influence. The jury found

against the proponents on the issue of undue influence, and this judgment was affirmed by this court. See Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127.

From a review of the record relating to the Evans matter, the evidence is overwhelming that during the time Lydia F. Evans executed her will on January 22, 1951, and the codicil in February 1951, she was mentally competent to do so; and that when she requested the respondent to deliver her will to her on September 14, 1951, and at the time she executed the revocation of her will and codicil on September 15, 1951, Lydia F. Evans was competent to perform such acts. Samuel M. Forney testified that he did not remember a time when Lydia F. Evans was incompetent; and that she was a strong-minded woman, had a mind of her own, knew the nature and extent of her property, and the natural objects of her bounty. Galen Evans, a son of Lydia F. Evans, testified that his mother had a mind of her own. Martha Priebe, her daughter, testified that her mother had a will of her own. In fact, there is no competent evidence that up to the date of her death Lydia F. Evans was incompetent to make a will or revoke a will she had made, or that she could be unduly influenced with reference to her property at any time.

At the time Lydia F. Evans executed her will on January 22, 1951, she was possessed of real estate and personal property of the approximate value of $125,000. The respondent had represented her over a period of years prior to January 22, 1951, and knew the nature, extent, and value of her property. The respondent made no attempt to contact Lydia F. Evans after September 14, 1951, to determine whether she wanted her will, or to suggest that if she would come to the office alone he would deliver it to her, although she lived until June 25, 1954. The record is clear that Lydia F. Evans herself, personally, requested the respondent to deliver her will to her.

In 7 C. J. S., Attorney and Client, § 19, p. 733, it is

said: "Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment." See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

"Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment." 7 C. J. S., Attorney and Client, § 23, p. 741.

We conclude that under the evidence the respondent was duty bound to give Lydia F. Evans her will upon her demand for it. There is no legal or logical reason why the respondent should not have complied with this request. We are in accord with the referee's finding on this matter that the respondent was guilty of unethical and unprofessional conduct.

With reference to paragraph No. VI of the complaint titled the Bentley matter, the complaint alleged in part that on September 14, 1953, the respondent was attorney for William Bentley in the matter of the guardianship of Lillian Bentley alleged to be mentally incompetent, a proceeding in the county court of Buffalo County wherein William Bentley, the son of Lillian Bentley, petitioned that his mother by placed under guardianship. This petition was filed in the spring of 1953, and at all times during said action Lillian Bentley was represented by Ward W. Minor, an attorney at Kearney, Nebraska. The complaint alleged that the respondent went to the Bentley home for the purpose of obtaining a statement from Mrs. Bentley, knowing that she was represented by counsel, and to obtain such a statement without the permission of her counsel. Lillian Bentley and her husband, Bert Bentley, resisted this guardianship. The respondent and Minor discussed this case prior to trial, during the latter part of June or first part of July 1953, at which time Minor suggested

that the respondent talk to Dr. Wiltse who was Lillian Bentley's doctor. Minor testified that he never at any time gave respondent permission to talk to his client, Lillian Bentley, or to her husband Bert Bentley; that he not recall giving permission to the respondent to talk to his client Lillian Bentley; and that he did not recall any other conversation with the respondent about this matter prior to the discussion setting the case for trial, or with respondent's secretary being present, or any conversation between him and the respondent. The respondent testified that Minor told him to see Dr. Wiltse and get a report from him, and early in March 1953, he saw Dr. Wiltse. The respondent did receive a report from Dr. Wiltse dated May 13, 1953. The doctor's report was to the effect that Lillian Bentley's mind was clear; and that she was competent and could comprehend. The respondent further testified that toward the end of June or July 1953, he met Minor in the courthouse and told Minor that William Bentley had told the respondent four or five times that his mother wanted to see the respondent; that there were also certain persons who cared for Lillian Bentley and knew about her condition; and that Minor told the respondent to go and see his client, Mrs. Bentley. The respondent testified that at a later date he telephoned Minor with reference to seeing Mrs. Bentley and told him that if nothing was wrong with her mind, or if she was competent, he would dismiss the guardianship proceedings, and Minor replied: "It's alright; I am sure you will see she is o.k." The respondent's secretary corroborated the respondent's testimony as above set forth, in most respects.

The respondent made arrangements with David Drage, a deputy sheriff of Buffalo County, to take respondent and his secretary to see Mrs. Bentley who lived at Shelton, Nebraska. The reason for this was that Bert Bentley was presumed to be a violent person. The respondent told William Bentley and Drage that he had permission from Minor to talk to Mrs. Bentley. The group

picked up William Bentley in Shelton on the way to the Bentley home. The respondent's purpose in talking to Mrs. Bentley was to see if she was mentally competent, and if he thought she was he was going to dismiss the guardianship proceedings. When the group arrived at the Bentley home, the respondent asked Drage to go into the house first and ask Mrs. Bentley if she wanted to see him. Drage went into the house, and came out and told the respondent that Mrs. Bentley wanted to see him. The respondent went into the house with Drage and met Bert Bentley a few feet inside the kitchen. Bert Bentley told them he did not want anyone talking to his wife. The respondent and Drage then left the house. The witnesses whose statements respondent wanted to take were not present, and the statements were not taken. On no occasion did Mrs. Bentley tell the respondent to get out of the house and stay out, and there was no conversation between the respondent and Lillian Bentley.

The respondent introduced into evidence an exhibit, the deposition of Robert L. Haines, and certain exhibits in addition thereto. The respondent told Drage that he wanted to take a statement from Mrs. Bentley, but did not tell him what it was. In a statement Drage made shortly after the incident he related a different story than that told by him before the Committee on Inquiry. Drage stated that when the party arrived at the house, all three of them got out of the car and proceeded up to the porch where they were met by Bert Bentley. Bert Bentley told them that Drage could go in to see Mrs. Bentley, but the others could not. Drage went into the house and was visiting with Mrs. Bentley when William Bentley, the respondent, and the respondent's secretary came in and stopped just inside the door. Bert Bentley told them to get out. The respondent announced to Bert Bentley: "I am here to take an affidavit from your wife." Bert Bentley refused to allow him to talk to his wife, and an altercation ensued. The respondent and

his party left. Lillian Bentley also told them to get out and leave her alone. Mrs. Bentley's statement was taken by Robert L. Haines, wherein she stated that she never invited the respondent to her home, nor did she give him permission to come to her home, and never gave her attorney permission for the respondent to come to her home. Subsequently, Bert Bentley died.

It is true, the respondent did not have the opportunity to interview Lillian Bentley. He had previously received a report from Dr. Wiltse in which the doctor reported the state of Mrs. Bentley's mind and that it was clear, and she was able to comprehend. Also in this report the doctor explained that Mrs. Bentley previously suffered a stroke and her condition had improved markedly from February 9, 1953. The respondent admits that he intended to talk to Mrs. Bentley, but denies that he intended to take a statement from her.

The relator's contention is that the respondent never received Ward Minor's permission to interview his client, and the mere fact that the respondent was prevented by Bert Bentley from keeping his announced plan does not prevent or excuse him from a violation of Canon 9, Canons of Professional Ethics.

Canon 9 provides in part: "Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." See, also, Lumbermens Mutual Casualty Co. v. Chapman, 269 F. 2d 478; Turner v. State Bar, 36 Cal. 2d 155, 222 P. 2d 857.

In the light of all the testimony relating to the Bentley matter, we conclude that the respondent violated the Code of Professional Ethics by his conduct, as determined by the referee. As the respondent stated, he could have taken the deposition of Lillian Bentley. True, the evidence in relation to this charge is in irreconcilable conflict, but we, under the rule heretofore announced

relating to an equity action, conclude that the referee did not err as contended for by the respondent.

Paragraph No. IV of the complaint relates to the Molzen matter. The respondent represented Hazel Molzen in a divorce case. She employed him on March 22, 1951. He prepared a petition for divorce in her behalf and filed it on the same date. Her husband, Cecil W. Molzen, was represented by attorney Louis A. Holmes. The defendant's answer was filed June 2, 1951. On July 31, 1951, a decree was entered showing that a trial was had at which evidence was offered by the plaintiff but none by the defendant. On the same day there was filed an agreement in contemplation of divorce signed by Cecil W. Molzen in Minnesota on June 19, 1951. Also on July 31, 1951, the respondent's firm filed an attorney's lien in the district court. The respondent told Mrs. Molzen that the only fair thing to do, since the defendant's property was in Minnesota, was that he should ask the court to fix his attorney's lien at 15 percent, and that he would put it in the decree. Respondent prepared the decree before going into court on the date the trial was had. There was no testimony about attorney's fees at the hearing at the time the divorce was granted to the plaintiff. The respondent had not discussed this 15 percent attorney's lien provision with the district judge before he prepared the decree, but had discussed the matter with his client.

The parties to this divorce action had entered into an agreement and a property settlement whereby the plaintiff was to receive $5,500. Of this amount, $1,000 was received by her as a result of an assignment of a loan made by Cecil W. Molzen, her husband, to her brother. The respondent received in fees for this action the amount of $772.31. On December 4, 1951, Mrs. Molzen discharged the respondent and the members of his firm as attorneys representing her. A motion was filed in her behalf to strike from the decree the provision as follows: "Plaintiff's attorney is given a lien on amounts

due and owing from defendant to plaintiff in the amount of 15%." This motion was based on the fact that such a provision was beyond the authority of the court to enter in the decree, because the same was not shown by the pleadings. The respondent filed his application for leave to intervene, which was granted. The respondent, on April 3, 1953, filed an answer to the plaintiff's motion to strike, in which the respondent asserted his right to the 15 percent attorney's fee lien. The answer also affirmed the fact that the respondent had discussed the 15 percent provision appearing in the decree with his client prior to the entry of the decree. On February 5, 1954, the district court found that the 15 percent provision was included in the journal entry without any evidence having been taken thereon, that no actual agreement had been made, and struck such provision mentioned above from the decree.

The relator contends that the provision set forth in the decree charging 15 percent of the amount of alimony actually to be collected was, in effect, a contingent fee contract. In addition, the relator contends that the entry of the provision in the decree constituted a fraud upon the court.

In State ex rel. Nebraska State Bar Assn. v. Dunker, 160 Neb. 779, 71 N. W. 2d 502, this court said: "Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship." Annotation, 30 A. L. R. 188, cites and discusses authorities supporting such statement. They are too numerous to cite here. See, Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. S. R. 836; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; 17 C. J.

S., Contracts, § 235, p. 618; 5 Am. Jur., Attorneys at Law, § 166, p. 361.

The respondent contends that there was no contract for fees prior to the day the matter was terminated; that, in effect, the provision for 15 percent applied only to the alimony collected after the property settlement was entered into. The defendant, Cecil W. Molzen, had loaned $1,000 to the plaintiff's brother. As a part of the property settlement prior to the divorce, this $1,000 was assigned to Mrs. Molzen. Mrs. Molzen had this $1,000 from her brother and did not want Cecil W. Molzen trying to collect this amount from her brother again. This $1,000 had been paid to Mrs. Molzen a year before when she was in the hospital. No legal services were required to collect this $1,000, other than to include the item in the property settlement agreement, and this fact is admitted by the respondent. It is apparent that the respondent was basing his percentage fee on the total amount of alimony awarded and not just the collection of awarded alimony after the judgment had been rendered. This is wrong and unethical under the holding in State ex rel. Nebraska State Bar Assn. v. Dunker, *supra.*

The respondent prepared the decree and inserted this provision in it. He had not discussed the matter with the district judge before inserting it in the decree. No evidence was presented on the divorce trial concerning the fee. On February 5, 1954, the court found that the 15 percent provision was included in the journal entry without evidence being taken thereon and that no actual agreement had been made, and the court struck that provision from the decree. While it may be assumed that the district judge read the decree, the respondent failed to fully inform the judge as to its provision improperly incorporated therein.

Canon 22 of the Canons of Professional Ethics, provides in part: "The conduct of the lawyer before the

Court and with other lawyers should be characterized by candor and fairness."

We conclude that in the Molzen matter the conduct of the respondent was such that he acted in an unprofessional manner and perpetrated a form of fraud upon the court within the provisions of Canon 22 of the Canons of Professional Ethics. The referee so found and we are in accord with his findings in such respect.

The respondent asserts that the relator offered in evidence all of the testimony of the parties offered before the Committee on Inquiry, all of the evidence in the case of Jensen v. Priebe, *supra,* and other evidence; and that the relator knew, at the time of making such offers, exactly what evidence was contained therein.

The respondent cites Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, wherein this court said: "As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion." See, also, 58 Am. Jur., Witnesses, § 796, p. 441.

At the trial of this matter before the referee, the relator offered the proceedings before the Committee on Inquiry in evidence, pursuant to a stipulation entered into by the parties herein. The respondent first objected to the reception of this evidence, but subsequently withdrew his objection as to a part of the testimony, and has not claimed error or improper reception of evidence as to the balance thereof.

This court, in Krull v. Arman, 110 Neb. 70, 192 N. W. 961, said, quoting from Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 A. 361: "While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence

material to the case." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396; Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030.

Under the true rule herein set forth, while a witness may not be impeached by the party calling him, the testimony of such a witness may be contradicted. The evidence submitted by the relator certainly contradicted the testimony of the respondent and was entitled to as much weight as the referee concluded it merited, and as this court concluded it merited on a trial de novo.

The respondent raises the defense of laches, contending that he was prejudiced by the delay in filing and in investigating the charges as shown by the complaint.

In State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N. W. 2d 302, this court said: "Laches is an equitable doctrine and it does not result from the mere passage of time."

Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. See State ex rel. Nebraska State Bar Assn. v. Merten, 142 Neb. 780, 7 N. W. 2d 874.

In State ex rel. Nebraska State Bar Assn. v. Bates, *supra,* the court pointed out that the conduct of the respondent in that case continued until July 7, 1948, while the complaint before the Committee on Inquiry was made and filed in November 1954. It appears that in the Bates case a period of a little over 6 years had elapsed. In the instant case the oldest charges appear to be the Molzen divorce action and the action of the respondent relating to the will of Lydia F. Evans. The divorce decree in the Molzen case was entered in 1951, 6 years before the hearing before the Committee on Inquiry. However, the decree of divorce in the Molzen action was modified in 1954. In the Evans will matter the action of the respondent upon which the charge was based was in September 1951. However, the matter was not closed, and the will was contested in the dis-

trict court and which on appeal to this court resulted in an opinion filed in December 1956.

The respondent complains that Lillian Bentley and Bert Bentley are now deceased. Hearings before the Committee on Inquiry on all the charges against the respondent were held in July and August 1957. Bert Bentley died April 6, 1958. The respondent had the opportunity to cross-examine Bert Bentley at the hearing before the Committee on Inquiry, and that evidence was before the referee pursuant to the stipulation of the parties herein. Lillian Bentley died on February 3, 1958. Dr. C. E. Wiltse died in 1958. The respondent, if he desired, could have taken the depositions of the latter two persons mentioned. This matter occurred in 1953.

We conclude that the respondent's defense of laches is without merit.

The respondent contends that he was denied due process of law under Article XIV of the Constitution of the United States and Article I, section 3, of the Constitution of the State of Nebraska. In this connection, the respondent asserts that certain members of the Committee on Inquiry were biased and prejudiced against him, and should have been disqualified from acting on such committee; that the Advisory Committee refused to review this matter; that an investigator, who was duly appointed, solicited complaints against the respondent by interviewing attorneys for that purpose; that the rules governing the hearing before the Committee on Inquiry and the Advisory Committee require secrecy of the proceedings and such rules were violated; and that the respondent made demand of the Committee on Inquiry for documents and papers in the possession of such committee, which the committee refused to produce at such hearing.

The rules creating, controlling, and regulating the Nebraska State Bar Association consist of eleven articles. Without setting forth the substance of each and

every article, suffice it is to say that a Committee on Inquiry is appointed by the Supreme Court in each district court judicial district of the state, and the Advisory Committee appointed by the Supreme Court consists of one member from each Supreme Court judicial district. From a reading of all the rules creating, controlling, and regulating the Nebraska State Bar Association, it is obvious and very apparent that the only function of the two committees, that is the Committee on Inquiry and the Advisory Committee, is to investigate charges against any attorney to determine whether there is proper cause to believe he has been guilty of unethical and unprofessional conduct and has violated the Canons of Professional Ethics.

Under the Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 2 provides: "Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, * * *."

Rule 3 provides: "Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court."

Rule 4 provides in part: "Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, * * *."

Rule 7 provides in part: "Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the

pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. * * * The referee shall make a written report stating his findings of fact and recommendations. * * * and the referee shall promptly transmit to this court his report, together with such record so certified."

Rule 10 provides: "The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate."

It is noted that the rules of the Nebraska State Bar Association and the rules of the Supreme Court, as they relate to disciplinary matters, provide two separate and distinct procedures. The rules of the Nebraska State Bar Association provide for a judicial district Committee on Inquiry and a state Advisory Committee. The procedure therein set forth is primarily for the purpose of conducting an investigation, which investigation may be formal or informal. The purpose of this procedure is to make sure that no unwarranted complaints are filed against attorneys. By this means the charges against attorneys are investigated, and if sufficient facts appear to indicate that he might be guilty of a violation of a Canon of Professional Ethics, or might be subject to disciplinary action on the facts of each individual case, a complaint shall be lodged against him in the Supreme Court of the State of Nebraska.

In Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N. W. 489, this court said: "The term 'due process of law' has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs. (Cooley, Constitutional Limitations, 355.) * * * but is satisfied by a proceed-

ing applicable to the subject-matter and conformable to such general rules as affect all persons alike."

In Reed v. Reed, 70 Neb. 779, 98 N. W. 73, it is said: "Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained."

In Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, this court said: "The indispensable elements of due process are a tribunal with jurisdiction, notice of a hearing to the proper party, and an opportunity for a fair hearing according to applicable procedures."

In the instant case the relator has fully complied with these indispensable elements. A complaint was duly filed in the Supreme Court of this state; the respondent had full and complete notice of the same; he was given an opportunity to answer the complaint, which he did, at length; the issues were joined; a hearing was had, pursuant to the stipulation of the parties herein, before a referee duly appointed by this court; and evidence was heard on behalf of the relator and on behalf of the respondent. There can be no question, in the light of the decisions of this court, but that this court has jurisdiction to entertain disciplinary matters against lawyers admitted to the practice of law in this state.

It appears that the respondent primarily predicates denial of due process of law before the Committee on Inquiry and the Advisory Committee of the Nebraska State Bar Association. In the case of In re Sparrow, 338 Mo. 203, 90 S. W. 2d 401, it was pointed out that each state had complete control over the remedy which it offers to suitors in its court. The bar committees were clothed by rule with the power to make investigations and to hold formal hearings. Such investigations and hearings were found to be summary in character and not adversary in any proper sense but were intended to determine whether the facts were supported by credi-

ble evidence and whether or not such facts were sufficient to warrant the institution of a proceeding by information to discipline or disbar. The court said: "Subsequent subsections deal with the filing of information, issuance of summons, joinder of issue by answer, trial 'as in extraordinary legal remedies, always saving to each side a reasonable opportunity to present evidence and to be heard.' Thus the rights of confrontation of witnesses and due process of law are plainly and adequately safeguarded. It is plain also that the summary investigations and hearings provided for do not invade or impair any constitutional right of the person whose professional conduct is subjected to the preliminary enquiry."

As stated in the case of In re Conner, 357 Mo. 270, 207 S. W. 2d 492: "Procedure in disbarment is seldom uniform, varies widely with the state or Federal jurisdiction in which the action is pending and seldom follows any local code of civil procedure. Generally, the judicial department of the jurisdiction involved adopts and uses any procedure it deems appropriate to disbarment."

From our research, we have no doubt but that the matters relating to discipline, suspension, reprimand, or disbarment of attorneys practicing before the courts of each state are subject to the rules promulgated for that purpose. It is clear that the preliminary proceedings before the Committee on Inquiry and the Advisory Committee were merely investigating proceedings which neither end in any decree or establish any right. We conclude that the respondent was not denied due process of law in this case. The respondent's contention in such respect is without merit.

We have herein set forth certain of the charges against the respondent made by the relator in the complaint. We have carefully reviewed the record as it relates to all of the charges set forth in the complaint. The record shows that the respondent has failed to demonstrate loyalty and fidelity to his clients and to

meet the trust placed in him by them. In addition, in the practice of his profession he has not shown fairness and candor in his dealing with other lawyers, and has not dealt candidly with the facts in cases handled by him. It is also apparent from the record that the respondent has failed to uphold the honor and dignity of the legal profession.

The respondent has been actively engaged in the practice of law in this state for 28 years, with a rather large and extensive practice. Due to such practice, he should have been, and obviously was, well aware of the Canons of Professional Ethics which controlled his conduct while engaged in the practice of law. In view of the facts herein set forth, and all of the circumstances disclosed by the record relating thereto, we find that the ends of justice will be properly served by suspending the respondent from the further practice of law for a period of 1 year, the same to go into effect when our judgment rendered herein becomes effective. If, at the end of 1 year from the effective date of his suspension, respondent makes an affirmative showing sufficient to satisfy this court that he has fully complied with our order of suspension and that he will not, in the future, engage in any practices offensive to the legal profession then he will be reinstated and allowed to engage in the practice of law. In the event he fails to comply with the order as heretofore set forth, the suspension provided herein shall become permanent.

Judgment of suspension accordingly. All costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

DALE VOSS, JR., DOING BUSINESS AS TODD FINANCE CO., APPELLEE, V. ROLAND LINN, DOING BUSINESS AS HIWAY MOTOR CO., APPELLANT.

105 N. W. 2d 383

Filed October 14, 1960. No. 34785.

1. Contracts. A fundamental and indispensable basis of an enforceable agreement is a meeting of the minds of the parties thereto.
2. ———. When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying, or contradicting the express terms contained in the writing.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed.*

McCarthy & Kneifl, for appellant.

S. W. McKinley, Jr., and *Richard L. Jandt,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Dale Voss, Jr., doing business as Todd Finance Co., plaintiff and appellee, against Roland Linn, doing business as Hiway Motor Co., defendant and appellant, to recover $5,500 on a written guaranty of payment of money on a conditional sale contract entered into between one Christian Voss, signed Chris H. Voss, and the defendant, which contract was purchased by plaintiff and assigned by defendant to the Todd Finance Co., the name in which the plaintiff was conducting his business, with a written guaranty that the defendant would pay to the plaintiff the amount of the obligation of the contract in the event of the failure of Christian Voss so to do.

The case was tried to a jury and at the conclusion of

the evidence the court directed a verdict in favor of the plaintiff and against the defendant. A verdict was accordingly returned. Judgment was duly rendered on the verdict. A motion for new trial was filed which was overruled. From this verdict, the judgment, and the order overruling the motion for new trial the defendant has appealed.

By the petition it was declared in substance, to the extent necessary for the purposes of this opinion, that on or about June 28, 1957, the defendant sold five motor vehicles or trucks to Christian Voss for $6,500 under a conditional sale contract upon which there was a balance due of $6,000 when the contract was assigned for a valuable consideration to the plaintiff; that with the assignment the defendant gave the plaintiff a written guaranty of payment providing that if Christian Voss defaulted in the payment of any installment the defendant would on demand pay to plaintiff the full unpaid amount; that Christian Voss made default; and that demand was made for the balance due which was $5,500 no part of which had been paid. The prayer of the petition was for judgment for $5,500 with interest at the rate of 5 percent per annum from the date of the commencement of the action and costs. Copies of the conditional sale contract and the written guaranty were attached to and made a part of the petition.

To the petition the defendant filed an answer which, among other things, included a general denial. Neither specific pleadings nor evidence negatives the execution of and delivery of either the conditional sale contract, the assignment thereof, or the guaranty pleaded. Further, lack of consideration is not pleaded.

As affirmative defenses the defendant seeks to avoid the obligation of these instruments by an alleged oral agreement made prior to or contemporaneous with the written instruments that their obligation would be met otherwise than as therein provided and that thus the defendant would not be required to perform according

to the terms of the guaranty; by a purported oral agreement entered into subsequent to the original transaction which took the place of the original obligation; and in part by a claim that plaintiff collected money which should have been applied in payment of the obligation of the conditional sale contract, which was not so applied.

The plaintiff filed a reply in which he denied generally the allegations of the answer except such as were admitted to be true. The reply sets forth that one Armon Todd was agent of the plaintiff in the transaction. This is of importance since all acts and doings on behalf of the plaintiff were done and performed by Armon Todd.

The theory on which the court sustained the motion for directed verdict and rendered its judgment was that the plaintiff had proved the pleaded cause of action and that there was no competent evidence adduced or offered to support a defense.

As grounds for reversal the defendant has set forth three assignments of error. The first is a general contention that the court erred in sustaining the motion for new trial. This is obviously erroneous. It is clear that the intention was to say that the court erred in sustaining the motion for directed verdict. It will be so treated. The second is that the court erred in refusing to admit evidence of promises made by plaintiff which induced defendant to sign the contract. This must refer to the written guaranty and not the conditional sale contract since the contract was signed by Christian Voss or, as it appears thereon, Chris H. Voss. The defendant signed only as a witness to the signature of Voss. By the third assignment of error it is asserted that the court erred in refusing to admit testimony "relative to subsequent agreement based on consideration whereby appellee promised to hold appellant harmless in the event appellant stored trucks for appellee."

At the close of the evidence it conclusively appeared that the conditional sale contract had been executed and

delivered and the assignment was made and delivered all as pleaded by the plaintiff in his petition, with adequate proof of consideration. There was no substantial evidence to refute the proof of plaintiff that there was a default on the part of Christian Voss and that the balance due was the amount for which judgment was rendered.

This brings us to the question of whether or not there was error in the refusal to admit testimony as to inducement to the signing of the contract or, as is apparently meant, the guaranty.

Only two witnesses testified on behalf of the defendant. One of these was the defendant himself. No question was asked of him relating to the subject of inducement, and of course no offer of proof in this area was made.

Christian Voss was the other witness. The following question was propounded to him: "Q Did you hear Mr. Todd make any promises to Mr. Linn relative to the payments to be made under this contract?" Objection was made. The objection was sustained. The following question, which related to and was obviously an elaboration of the previous question, was propounded: "Q And prior to the execution of this contract?" Objection to this question was sustained. Thereupon the following offer was made: "Defendant offers to show by this witness that prior to the execution of this contract and the signing thereof by the defendant and the said Chris Voss, that Armon Todd promised the defendant Ole Linn that if he would sign said contract and if the plaintiff failed to collect within 90 days from the Macy Construction Co. the payments thereunder, that the defendant Roland Linn would be held harmless * * *." Objection to this offer was made and sustained.

If it be assumed that the purported promise contained in the offer was true and related to a subject which if established could be regarded as a defense to the action of plaintiff, and accordingly the rejection of the offer was erroneous, still in the state of the record here it could not be regarded as material. The record

is devoid of any evidence or offer of evidence the tenor or effect of which was to say that the defendant signed any document in reliance upon any such promise. The nearest approach is a purported conclusion in the offer, rendered inadmissible by the terms of plaintiff's objection, that Christian Voss would testify that the defendant refused to sign until the promise was made.

A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties. See, Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122; Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410.

There having been no evidence or offer of evidence of the essential elements of any enforceable oral agreement, on that ground the court did not err in sustaining the objection to the offer of the purported evidence of inducement.

There is another reason why it was not error to reject this offer. Proof of the agreement, if there was one, would not defeat the right of the plaintiff to recover on the guaranty. The controlling rule is as follows: "When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying or contradicting the express terms contained in the writing." Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412. See, also, Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132.

As to the third assignment of error there was no evidence whatever adduced or offered that there was a subsequent agreement to hold the defendant harmless. It is true that a question was responded to in which the defendant gave testimony relative to an agree-

ment but on motion the answer was stricken by the court and objection to the question sustained. The subject was not pursued further. There is no merit to the assignment of error.

For the reasons herein stated the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

COUNTY BOARD OF SUPERVISORS OF PLATTE COUNTY, NEBRASKA, EX OFFICIO THE COUNTY BOARD OF PUBLIC WELFARE, APPELLANT, V. LESTER W. BREESE ET AL., APPELLEES.

105 N. W. 2d 478

Filed October 14, 1960. No. 34788.

1. Statutes. A legislative act operates prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
2. Liens. A positive legislative enactment prescribing conditions essential to the existence and preservation of a statutory lien may not be disregarded.
3. ———. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to a case not within the terms of the statute.
4. Statutes. If a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed.
5. Statutes: Actions. A legislative body which creates a right of action has power to determine the conditions under and the time within which it must be brought.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

C. Thomas White, for appellant.

Edward Asche, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The circumstances important to this litigation are not in dispute. Katherine Breese, also named in the record as Katherine W. Breese, the wife of Orrin C. Breese, was for many years the record owner of a tract of land which is involved and precisely described in this case. It was a residence property on which the named parties lived with their two sons until they became adults and left the home. Katherine Breese and Orrin C. Breese continued to make their home on the property until the death of each. Orrin C. Breese was a teamster. His employment was not generally continuous or greatly remunerative. He was during the difficult years of the thirties also engaged in custodial work at a bakery. His wife was not employed at any time outside of the home. The income of the parents was frequently less than their necessitous requirements. They had during a period of about 30 years different loans from a money-lending agency at Columbus which were secured on their home property.

Lester W. Breese, the younger son, hereafter referred to as appellee, during the later years he was living at home with his parents paid them for his board and room. He left home in 1926 and was in business in Fremont until 1947. In the early part of 1926 he arranged a loan of $1,300 which was secured on the home of his parents, the proceeds of which were used by them in repairing and making livable the house in which they lived and in paying past-due bills which they had accumulated. The indebtedness of $1,300 and interest was paid by appellee in installments of $14.95 each month. Thereafter appellee paid his parents $10 to $15 a month. Appellee later paid the expense of a new roof, painting, and repair work on the home of his parents at an expense to him of about $550. His

father, because of age and illness, could not handle coal for the furnace and appellee had it changed over for burning oil as fuel at an expense to him of about $160. The contributions by appellee to his parents were measured by the need of the parents. When they needed something he got it for them until he was disabled and could hardly care for himself.

The older son, Archie Breese, resided and was employed in Chicago. He substantially assisted his parents but the exact extent thereof is not shown by the record. The death of Archie Breese was caused by an accident in Chicago in the fall of 1945 but before October 22, 1945. Appellee took his father to Chicago and they attended the funeral of Archie Breese.

After appellee and his father returned from attending the funeral in Chicago the parents, Katherine Breese and Orrin C. Breese, on October 22, 1945, conveyed by deed the real estate involved in this case from themselves to themselves as joint tenants with right of survivorship and the same day the parents conveyed by warranty deed the identical real estate to their sole surviving child, Lester W. Breese, subject to a reservation in the deed of a life estate in the real estate to the grantors or the survivor of either of them. The last deed was executed and duly delivered to appellee that day but it was not recorded until after the death of his father, Orrin C. Breese, at the request and insistence of the father who died May 11, 1952. The deed was recorded on June 2, 1952. The deeds were prepared by an attorney in his office at Columbus after consultation with the parties.

Appellee was disabled by illness in the year 1946 and he was unable to care for or to further contribute to his parents. Katherine Breese and Orrin C. Breese each made application for old age assistance, the former on October 25, 1946, and the latter on October 31, 1946. The applications were each approved and assistance benefits were paid Katherine Breese for the period of

September 1947 to May 1952 in the sum of $1,433.20 and to Orrin C. Breese for the period September 1947 to April 1952 in the sum of $1,184. A certificate of award of old age assistance to Orrin C. Breese and Katherine Breese was recorded in the office of the register of deeds of Platte County on September 7, 1947. Appellee regained his health and the attorney for appellee at his request advised the county welfare director of Platte County on May 15, 1952, 4 days after the death of Orrin C. Breese, that appellee desired to and would care for the needs of his mother and that assistance benefits for her should be discontinued. The attorney also told the director at that time of the deed of the real estate to appellee. Appellee did care for his mother thereafter until her death and he paid the expense of her last illness and burial.

The statement of the claim of appellant as set forth in its petition, to the extent it is important to this discussion, is that Orrin C. Breese and Katherine Breese, hereafter called recipients, while receiving old age assistance payments from Platte County had an interest in the real estate involved herein; that a certificate of award of old age assistance payments made to recipients is recorded in the mortgage records of the register of deeds of that county; that Orrin C. Breese died May 11, 1952, and Katherine Breese died September 14, 1957; that recipients received old age assistance payments in the respective amounts above stated; and that the amounts thereof constitute a valid, subsisting lien against the real estate involved in favor of Platte County, prior and superior to any right, title, or interest which any of the defendants in the case have or claim in or to the real estate. The relief sought was a determination of the amount of the lien; that it be adjudged to be a first encumbrance on the real estate; that the lien be foreclosed; and that the premises be sold and the proceeds be applied to the payment of the lien.

Appellee admitted that the beneficiaries had an in-

terest in the real estate involved while they were receiving old age assistance payments from Platte County; that they received old age assistance payments in an amount unknown to appellee; that a certificate of award was recorded on September 7, 1947, as alleged by appellant; and that the recipients died on the respective dates alleged. Appellee denied all other assertions of appellant. The cross-petition of appellee asserted that on October 22, 1945, recipients as joint tenants were owners of the real estate involved herein and that on that date they conveyed it to appellee subject to a life estate therein for the life of the grantors and for the life of the survivor of either of them; that the deed was recorded June 2, 1952, in the deed records of Platte County; that the conveyance of the real estate to appellee by the recipients was not made to attain old age assistance payments but in consideration of benefits conferred upon them and improvements made on the real estate by appellee for the benefit of recipients; that the old age assistance payments made to recipients or either of them were based on their respective needs and not in reliance of ownership by or interest of the recipients in said real estate; that the filing of the certificate of award and the commencement of these proceedings were a cloud upon the title of appellee to the real estate and he was entitled to have it removed and the title thereto quieted in him; and that the conveyance of the real estate by the recipients to appellee was made within 2 years prior to the application of each of the grantors for old age assistance benefits and this action was commenced on April 1, 1959, which was more than 1 year after the death of both of the recipients. Appellee asked the court to deny appellant any relief, to cancel the claim of lien recorded as aforesaid, and to quiet title to the real estate in appellee.

The district court found generally for appellee and against appellant and that it had no cause of action against appellee, rendered judgment of dismissal of the

action of appellant, and quieted title to the real estate in appellee. The motion of appellant for a new trial was denied and this appeal is from the action of the trial court denying the motion.

There was no lien in this state because of the receipt of old age assistance payments by anyone when the deed was made and delivered by the recipients to appellee for the real estate involved on October 22, 1945. Section 68-268, C. S. Supp., 1939, providing for a lien for any old age assistance benefits received by a recipient thereof on any real estate owned by him, as that section was amended by Chapter 4, section 1, page 66, Session Laws of Nebraska, Fifty-fourth (Extraordinary) Session, 1940, was repealed by act of the Legislature of 1941. Laws 1941, c. 169, § 3, p. 671. That act of the Legislature had an emergency clause and was in force and effect upon the passage and approval of the act May 12, 1941.

Section 68-215.01, R. R. S. 1943, was enacted by the Legislature at its session in 1947. Laws 1947, c. 221, § 1 (2), p. 711. It is as follows: "The assistance benefits any recipient of old age assistance shall receive shall be a lien on any real estate owned by the recipient of such assistance from and after the date of the filing of the certificate as provided in this section. Whenever a certificate is issued for such assistance to any person in whom the title to any real estate is vested, a copy of such certificate shall be indexed and recorded in the manner provided for the indexing of real estate mortgages in the office of the register of deeds or county clerk of the county in which the real estate is situated and such recording and indexing shall constitute notice of such lien." This statute became effective September 7, 1947. Alexanderson v. Wessmann, 158 Neb. 614, 64 N. W. 2d 306. This legislative act operates prospectively only because there was no legislative intent and purpose clearly disclosed for it to

operate retrospectively. Arterburn v. Vandemoer, 157 Neb. 68, 58 N. W. 2d 606.

It is indisputable that commencing with May 12, 1941, and continuing to September 7, 1947, there was no provision of law in Nebraska for a lien on real estate because of the payment or receipt of old age assistance. It was in this period that the deed was made and delivered by the parents of appellee to him for the real estate involved in this case. The deed was legal, valid, and effective. It was not affected by the legislative act of 1947 quoted above, passed almost 2 years after the deed was made and delivered. The making and delivery of the deed violated no prohibition or restriction of law. It had the authorization and sanction of law when it was executed and delivered. It vested title to the real estate in appellee subject only to the life estate reserved therein. The grantors in the deed owned only a life estate in the real estate when the applications were made by them for old age assistance and thereafter until the death of each of them. When they received old age benefits the real estate was not owned by them beyond their life estate. The deed had been since October 22, 1945, a legal, valid conveyance of the fee of the real estate to appellee. The decision of the trial court favorable to appellee was correct.

Section 68-215.05, R. R. S. 1943, which was Laws 1947, c. 221, § 3, p. 711, provides: "The county attorney, when directed either by the county board of public welfare or State Director of Public Welfare, shall bring such proceedings as are necessary to enforce the payment of old age assistance claims by setting aside any conveyance of real estate * * * made by any person receiving old age assistance benefits when such conveyance was made without payment of adequate consideration and with the intent to aid such person to receive old age assistance benefits."

Section 68-215.07, R. R. S. 1943, which was Laws 1951,

c. 211, § 2, p. 773, contains these relevant provisions: "Any conveyance or transfer of real estate by a recipient of old age assistance or by an applicant for old age assistance within two years prior to the making of application may be set aside at any time until one year after the death of such recipient in all cases where such conveyance or transfer is made to a child * * * without adequate consideration. * * * Such action to set aside transfers of real estate * * * may be brought in the name of the county board of public welfare of any county in the proper court having jurisdiction; Provided, if the county board of public welfare fails to bring such action prior to three months before the expiration of the time to commence the action, then the action may be brought by the State Director of Public Welfare in the name of the State of Nebraska."

The deed to appellee was made and delivered October 22, 1945. The application of Katherine Breese for old age assistance was made October 25, 1946, and the application of Orrin C. Breese for old age assistance was made October 31, 1946. Orrin C. Breese died May 11, 1952, and Katherine Breese died September 14, 1957. This action was not commenced until April 1, 1959. The deed in question was made to appellee by the recipients of old age assistance benefits within 2 years prior to the making of the applications by the recipients. This action was not commenced until more than 1 year after the death of each of the recipients. This case was and is within the bar of the very statute which appellant must rely upon for the relief sought. The action was barred by the statute more than 6 months before it was commenced. § 68-215.07, R. R. S. 1943.

Appellant seeks in this case to have the benefit of an alleged statutory lien. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the

statute. It cannot be extended by the court to cases not within the statute.

Interurban Constr. Co. v. Central State Bank of Kiefer, 76 Okl. 281, 184 P. 905, states: "The rule of construction of lien statutes which create a right and provide a remedy is: That in all such cases the requirements of the statutes and conditions prescribed in the statutes are the measure of the right, and the court cannot declare purposeless and useless that which the Legislature has made a condition of the lien."

In Serasio v. Sears, 58 Ariz. 522, 121 P. 2d 639, the court considered a statutory provision that to keep alive a judgment and to continue the lien thereof after a stated period, an affidavit of renewal was required to be made within a designated period and a copy of the affidavit properly certified by the clerk of the superior court was required to be filed with the county recorder. Such an affidavit was made but a certified copy of it was not procured or filed as the statute required. The court said: "That was necessary to continue the lien * * *. If defendant Serasio ever had a lien it was by virtue of the statute and, to be valid, the law giving the right must have been complied with."

Gau v. Hyland, 230 Minn. 235, 41 N. W. 2d 444, contains this: "The provision of § 256.26, subd. 6, that an old age assistance lien 'shall attach to all real property then owned by the recipient * * *' defines and limits the property chargeable with such a lien. It is to be remembered that the old age assistance lien is a statutory one. The property chargeable with a statutory lien and the character, conditions, and extent thereof are to be ascertained from the terms of the statute. * * * By express terms of the statute, an old age assistance lien attaches to 'real property' and to only such thereof as is 'owned by the recipient.'"

United States v. Beaver Run Coal Co., 99 F. 2d 610, contains the following: "Notwithstanding its failure to comply with the requirements of the very act cre-

ating its lien, the United States contends its lien is entitled to priority in this case. * * * This contention can not be sustained. Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that 'the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' * * * Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded."

The court said in Augustine v. Congregation of the Holy Rosary of Pompeii, 213 Wis. 517, 252 N. W. 271, the following: "Under those provisions (Sec. 289.06, Stats. 1931) no lien given by ch. 289, Stats., shall exist and no action to enforce such a lien shall be maintained unless the complaint was filed as well as served within the prescribed period. As to plaintiff's claim for a lien, that period expired on November 13, 1932. Thereafter, by virtue of the unambiguous terms of the very statute under which he claims a right to have a lien, no such lien shall exist and no action can be maintained to enforce it. * * * After the expiration of that prescribed period, the court, as it rightly ruled, was without discretion to avoid that statutory bar as to the lien by enlarging that period for the filing of a complaint on plaintiff's motion."

In Gile v. Atkins, 93 Me. 223, 44 A. 896, 74 Am. S. R. 341, the court said: "The statutory lien, therefore, continued in force until the beginning of the 11th day of January, 1899, and then expired. The plaintiff's attachment was not made till the next day, January 12th, when the lien no longer existed. * * * But the plaintiff insists that the defendant is estopped from questioning the seasonableness of the attachment, be-

cause when apprised, some two months previous, of the plaintiff's intention to enforce his lien, he assured the plaintiff the colt was foaled on July 20th and thereby induced the plaintiff to delay the attachment. * * * the lien in this case was created solely by statute and had such duration only as the statute gave it. Its entire vitality was dependent on the terms of the statute. * * * It could derive no life, nor prolongation of life, from any statements of the defendant * * *. There was no lien on the colt of any kind or extent outside of the statute. * * * One of those terms is that the attachment should be made before the colt was six months old. There is no provision that the parties, either or both, by estoppel or in any other way, may substitute a later date for the attachment."

De Gooyer v. Northwest Trust & State Bank, 130 Wash. 652, 228 P. 835, declared: "Statutes creating liens are in derogation of the common law and are to receive a strict construction. * * * Their operation will not be extended for the benefit of those who do not clearly come within the terms of the act. It is true that § 1209, Rem. Comp. Stat. (P.C.S. 9665b), provides that the lien laws shall be liberally construed with the view to effecting their object. This means that when it has been determined that persons come within the operation of the act it will be liberally applied to them."

Rent-A-Car Co. v. Belford, 163 Tenn. 590, 45 S. W. 2d 49, asserts: "When a lien comes into existence by force of a statute, it must be measured by that statute, and can have no greater force than the statute gives it."

Birmingham Trust & Savings Co. v. Louisiana National Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600, states: "The lien being created by statute, is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute."

The statutes noted above are indispensable to the

cause of action asserted by appellant. §§ 68-215.01 and 68-215.07, R. R. S. 1943. These created a right that did not exist at common law. A condition precedent to the enjoyment of the right was a compliance with the requirements imposed, one of which was that an action to test the validity of any conveyance of real estate made by a recipient of old age assistance to a child of the recipient within 2 years prior to the making of the application by the recipient for the assistance must be brought within 1 year of the death of the recipient. This is by the statute made a condition to the right and of the remedy. Appellant could not comply with this indispensable requirement because the period allowed within which the case was required to be commenced had elapsed when these proceedings were instituted. It has often been said and recently repeated by this court that where a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed. Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898. The observation made in Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542, is appropriate: "It must be conceded that the legislative body, which created the right of action, had absolute power to determine the conditions under which it must be brought * * *. Without such a law the plaintiff in this case would have had no right of action at all * * *."

The judgment should be and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

ROSS NISI AND MARY NISI PALMESANO, ADMINISTRATOR AND ADMINISTRATRIX OF THE ESTATE OF MARTHA NISI, ALSO KNOWN AS MATTIA NISI, DECEASED, APPELLEES, V. CHECKER CAB CO., A CORPORATION, APPELLANT.
105 N. W. 2d 523

Filed October 21, 1960. No. 34774.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
4. **Automobiles: Evidence.** A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied.
5. ———: ———. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter.
6. **Automobiles: Negligence.** Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence.
7. ———: ———. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances.
8. ———: ———. The operator of an automobile equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question

for the jury. The question whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide.

9. ———: ———. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Albert Lustgarten, Schrempp & Lathrop, and *Henry C. Rosenthal, Jr.,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Ross Nisi and Mary Nisi Palmesano, administrator and administratrix of the estate of Martha Nisi, also known as Mattia Nisi, deceased, against the Checker Cab Company, a corporation, defendant, to recover damages for the wrongful death of plaintiffs' decedent caused by the negligence of a driver of one of defendant's taxicabs. The jury returned a verdict in favor of plaintiffs and against the defendant, assessing the amount of recovery for plaintiffs in the sum of $8,868.15. The defendant filed a motion to set aside the verdict and for judgment in accordance with its motion for directed verdict at the conclusion of the plaintiffs' evidence and at the conclusion of all of the evidence. This motion was overruled. From the overruling of defendant's motion, the defendant perfected appeal to this court.

The plaintiffs' petition, insofar as it need be con-

sidered here, alleged in substance that on or about May 30, 1958, at about 9:20 p.m., Martha Nisi was proceeding from the west to the east side of the street in front of or to the east of the premises described as 1234 South Tenth Street in the city of Omaha; that as she reached a point at about the center of the street she was then and there struck by a northbound Checker cab operated by the driver, Stanley W. Hartwell, in the course and scope of his employment with the cab company; and that as a result of such collision Martha Nisi was thrown to the street and killed. The plaintiffs further alleged that the death of Martha Nisi was directly caused by the negligence of the driver of such taxicab in the following respects: (1) In operating the taxicab at such time at an excessive rate of speed; (2) in his failing to keep a proper lookout at such time and place; (3) in failing to keep the taxicab under proper control; and (4) in failing to operate the taxicab on the right or east side of the street.

The first cause of action alleged in the plaintiffs' petition related to the loss of services to the surviving husband and the second cause of action related to burial expenses and other expenses incident thereto.

For answer to the plaintiffs' petition the defendant admitted that the plaintiffs were the duly authorized, appointed, qualified, and acting administrator and administratrix of the estate of Martha Nisi, deceased, and were residents of Omaha; that the defendant was engaged as a common carrier in the taxicab business in the city; and that at the time and place set out in the plaintiffs' petition an accident occurred and as a result thereof the plaintiffs' decedent met death. The defendant's answer denied all other allegations contained in the petition, and further denied that its driver was negligent. The answer then claimed that the sole and proximate cause of the accident and resulting death of Martha Nisi was her contributory negligence which was more than slight in failing to cross the street on a

crosswalk; in failing to keep a proper lookout or to take precautions for her safety; and in moving into the path of the defendant's vehicle. Defendant prayed that the plaintiffs' petition be dismissed.

For reply to the defendant's answer, the plaintiffs denied all of the allegations contained in such answer which were not admissions of plaintiffs' petition.

The defendant assigns as error (1) that the trial court erred in overruling defendant's motion for directed verdict at the conclusion of plaintiffs' evidence and at the conclusion of all of the evidence; (2) that the trial court erred in overruling the defendant's motion to set aside the verdict and judgment and for judgment in accordance with the motion for directed verdict; and (3) that the trial court erred in refusing to hold that the plaintiffs' decedent was guilty of contributory negligence as a matter of law.

The following rules of law are applicable to this case.

In Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, this court held: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. See, Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

The record shows that a police officer of the city of Omaha assigned to the traffic investigation division of

the police department arrived at the scene of the accident shortly after 9:20 p.m., on May 30, 1958. Upon arriving at the scene, he found a vehicle and the body of a female person. The pavement was dry and it was generally clear that evening. He made an investigation in the 1300 block on South Tenth Street. He testified that the block constitutes several blocks between William Street and Pierce Street, with no intervening cross streets between those two streets; and that the closest stop-and-go signal is on South Tenth and William Streets, approximately 4 blocks from the general scene of the accident. He asked the driver of the Checker taxicab, which was the vehicle he found at the scene of the accident, to tell him and to show him approximately where the party stepped from the curb and where she was struck. The driver pointed out a place in front of 1315 South Tenth Street, on the east side of the street. This witness further testified that South Tenth Street is 50 feet 2 inches wide. The taxicab was approximately 69 feet north of the point where the driver of the taxicab indicated it struck Mrs. Nisi. There was a white line in the center of South Tenth Street. This street runs north and south. From his investigation, the officer determined that there were skid marks approximately down the center of the white line, and some skid marks slightly west of the center line. The skid marks extended backwards from the right rear wheel of the taxicab and east of the center line of the pavement. The skid marks began in front of the residence at 1315 South Tenth Street and continued northward and ended at the rear wheels of the taxicab. The body of Mrs. Nisi was found 23 feet 8 inches from the left front wheel of the taxicab and 21 feet 9 inches from the right front wheel of the taxicab. The body was lying on its back. He could see a bone sticking through the skin on one of the legs, and the face was covered with blood. He further testified that in the area where the accident occurred the

speed limit was 25 miles an hour. This witness further testified that he smelled alcohol on the breath of the driver of the taxicab.

On cross-examination this witness testified that there were large trees on both sides of South Tenth Street with branches hanging over the street; and that the taxicab driver said when he first saw Mrs. Nisi she was right in front of the cab, when it hit her. He asked the cab driver to tell him approximately where Mrs. Nisi walked out from the curb. The driver went over to the front of 1315 South Tenth Street and pointed to the curb in front of that address, stating that was where Mrs. Nisi came from, going from the east to the west.

On re-direct examination this witness testified that he took the cab driver back and showed him the skid marks.

Across the driveway north of the mortuary hereinafter referred to there is a street light. This light is approximately 20 feet above the street and on an arm extending 10 to 12 feet from the west curb on South Tenth Street.

A captain of the Nebraska Safety Patrol testified that he had been associated with the patrol for 22 years and was in charge of the education and training division of the patrol. In 1944, he was awarded a fellowship by Northwestern University in the study of traffic administration, including specialized study of the investigation of physical facts. He had classwork, and conducted tests at various speeds with different types of automobiles to compute various speeds from various stopping distances, and made skid mark and speed computations. Following his work at Northwestern University he conducted a training course for new officers in the Nebraska Safety Patrol, and was an instructor in the field of skid marks. This witness testified that he made an examination in the area between William and Pierce Streets on South Tenth Street in the fore part of April 1959;

and that the surface of the street was an asphalt-type pavement with coarse sand ground into the asphalt. He further testified that in arriving at an estimate and opinion relating to the speed of the taxicab as judged from the skid marks, he would take into consideration the type of paved surface of the street, the grade, and the condition of the pavement, whether it was wet or dry. The weight of the automobile would make a very slight difference with respect to figuring speed from skid marks. The condition of the tread on the tires would not make any difference on the stopping distance. He further testified that with respect to skidding with the wheels locked, the cramping of the wheels to the right or left makes no difference in the driver's ability to stop the car; and that after the brakes are locked the driver would be unable to steer the car as the wheels would be unable to turn. He further testified that assuming a grade of 5.4 percent on South Tenth Street, where the taxicab left a total of 69 feet of skid marks, he would estimate the speed of the taxicab to have been 34 or 35 miles an hour, which would be a minimum speed. He further testified that the normal reaction time in a situation where something unexpected comes up and it is necessary to decide what to do and then act, would be about three-quarters of a second, and that a car traveling 34 or 35 miles an hour would travel about 38 feet during three-quarters of a second. He repeatedly stated that the formula used by the Nebraska Safety Patrol actually favors the driver, and is a computation that is very lenient.

On cross-examination he testified that the length of the wheelbase of a car is not subtracted from the length of the skid marks in figuring the speed of the car.

A draftsman in the public works department of the city of Omaha fixed the grade on South Tenth Street between William and Pierce Streets at 5.4 percent.

A doctor testified that after the accident, when Mrs. Nisi's body was brought to the hospital, he examined

the body and pronounced her dead. He further examined the body and found that she had a laceration on the scalp, many bruises, abrasions, and scrapes on the skin, and dirt and gravel were ground into the skin. She also had compound fractures of the left leg and the right arm. The skin was broken, and the bones were protruding through the skin.

Dr. Levine, an expert on blood analysis who makes analyses for the Omaha police department to disclose the alcoholic content, analyzed the blood of the taxi driver and testified that it had an alcoholic content of .125 percent. This witness further testified that where the content is between .1 and .125 percent, the reaction time is slowed, as well as a person's judgment. At .125 percent, deterioration of vision, judgment, muscular activity, and reflex action begins.

The driver of the taxicab was taken to the police station and interviewed by a captain of police. A written statement was taken from him, which he signed. At the trial he was questioned about this statement. He was asked if he saw Mrs. Nisi before the right front fender of the cab struck her. He answered that she was from 2 to 4 feet in front of the right front fender when he first saw her. He did not remember telling anyone that he did not see her until the right front fender of the taxicab struck her. He was handed the statement containing his signature, and he recalled that the statement was taken the night of the accident. He testified that he possibly made the statement that he did not see Mrs. Nisi until she was in front of the taxicab, but he was so nervous at the time that he could not say whether he did or not.

Just prior to the accident Mrs. Nisi attended a wake at the Salanitro Mortuary which is on the west side of South Tenth Street about midway between William and Pierce Streets. The distance between these two cut-through streets is approximately 900 feet. Mrs. Nisi lived with her husband and son on South Ninth

Street, almost directly east of the Salanitro Mortuary. She bade some acquaintances at the wake goodbye and left the mortuary. Just after she left, someone came into the mortuary and said there had been an accident to someone who had just left the mortuary.

A witness for the defendant testified that when the accident occurred he was driving his 1950 blue Buick about 20 or 25 feet behind the taxicab. When he entered South Tenth Street at William Street, from the west, he had observed the northbound taxicab. At the time the taxicab went through the intersection it was traveling, according to the best judgment of this witness, approximately 25 miles an hour. This witness testified that after he got onto South Tenth Street he was traveling about 10 car lengths behind the taxicab; that the lights on the taxicab were on; and that he was gaining on the taxicab and supposed he was 6 car lengths behind the taxicab when something unusual happened. He further testified that the taxicab was traveling where normal traffic travels. Cars were parked on both sides of the street. This witness stopped his car 2 car lengths behind the taxicab. He got out of the car and walked to the back of the taxicab. He saw no skid marks. At the scene of the accident there were trees on each side of the street and it was rather dark in that area.

The driver of the taxicab testified that he reported for work at the taxicab company about 5:30 p.m. He had made seven trips up to the time of the accident, the last one being from the Burlington bus depot to a hospital. After he discharged that passenger, he started to return to the depot and was proceeding north on South Tenth Street. He went through the intersection of South Tenth and William Streets when the green light was in his favor, and was followed by another vehicle that had been waiting for the light so that it could turn left on South Tenth Street. This driver further testified that he went down the incline, and it was

rather steep to the north, and when he had traveled two-thirds of the block down such incline, all at once, just in front of his right headlight and within a few feet, a lady stepped out in front of the cab. It was rather dark along there. When the lady stepped out, he applied his brakes and swerved the taxicab to the left, which would be to the west, and the lady must have become confused because she took another step after he had seen her. He further testified that when he first saw Mrs. Nisi she was a little bit to the right of the right headlight; and that at that time she was facing west and, according to this witness' testimony, had apparently taken another step just after he saw her. When the taxicab struck Mrs. Nisi, she fell back over the right fender of the taxicab. It traveled approximately 30 to 35 feet before coming to an abrupt stop. The sudden stop threw her forward directly in front of the taxicab at a slight angle toward the center of the street. The front end of the taxicab was across the center line to the west, and the rear wheels of the taxicab were to the east. This witness further testified that at the time of the accident Mrs. Nisi was wearing dark clothing.

On cross-examination this witness testified that on the day of the accident he arose at 3:30 or 4 p.m., and drank a bottle of beer in his room. He further testified that he had dinner at the Avalon Bar and Restaurant around 7:15 p.m., and stayed there probably 20 or 25 minutes. He further testified that there was a dent on the top of the right front fender of the taxicab.

With reference to the speed of the taxicab, the expert witness testified that he estimated the speed of the taxicab at the time of the accident to be 34 or 35 miles an hour. Such speed was over the maximum speed limit allowed for travel in the area in which the accident occurred.

In Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697, this court held: "A qualified expert, upon laying a

proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied."

In Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, this court held: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. See 5 Am. Jur., Automobiles, § 630, p. 850." See, also, Shields v. County of Buffalo, *supra.*

In Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604, this court held: "Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence."

It appears that Mrs. Nisi, in order to arrive at a crosswalk, would have had to walk about 390 feet to William Street, or a greater distance to Pierce Street, to arrive at any marked or unmarked crosswalk. Under the statute and the city ordinance of the city of Omaha, a pedestrian crossing a street at any point other than within a marked or unmarked crosswalk shall yield the right-of-way to vehicles upon the street. Notwithstanding such provisions, every driver of a motor vehicle shall exercise due care to avoid colliding with any pedestrian upon a roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precautions.

In Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court said: "In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of a motor vehicle owes to one crossing a street at a point not a regular cross-

ing the duty of reasonable and ordinary care under the circumstances, * * *."

In the instant case the physical facts show that Mrs. Nisi was near the center of the street when the taxicab struck her. The taxicab was moving in a straight line north to the point of impact. There were no automobiles approaching with blinding headlights, nor any other reason given by the driver of the taxicab for his failure to see Mrs. Nisi until the defendant's taxicab struck her.

This court said in Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182: "The operator of an automobile equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question for the jury. The question whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide."

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury." Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422.

We have heretofore set out evidence concerning the odor of intoxicating liquor on the breath of the taxicab driver as observed by the investigating officer, and the percentage of alcoholic content of his blood as testified to by an expert on the subject. This evidence was admitted upon the issue relating to the driver's control of the taxicab at the time of the accident. The trial court did not instruct the jury on the question as to whether or not the driver of the taxicab was under the influence of intoxicating liquor. This evidence was properly admitted as evidence of negligence when

coupled with the physical acts or omissions, lack of control, or diminution of vision in the operation of the taxicab, and was for the consideration of the jury. See Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147.

The defendant pleaded the defense of contributory negligence on the part of the decedent. This is an affirmative defense which the defendant was obligated to prove by a preponderance of the evidence.

There were no objections on the part of the defendant to the instructions given by the trial court. The trial court properly instructed the jury with reference to the charges of negligence against the driver of the taxicab and the affirmative defense of contributory negligence, pleaded by the defendant, on the part of the decedent.

In the light of the evidence heretofore set out, the jury could find by a preponderance of the evidence that the defendant's driver was guilty of negligence in one or more of the elements of negligence pleaded in the plaintiffs' petition as heretofore set forth.

For the reasons given herein, the judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MARY JAROSH, APPELLEE, V. GEORGE VAN METER ET AL., APPELLANTS.
105 N. W. 2d 531

Filed October 21, 1960. No. 34783.

1. **Trial.** In a case where a motion was made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and thereafter a motion for a judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

2. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
3. ———. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
4. **Torts: Negligence.** A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or were the natural consequences of his original wrongful act.
5. **Negligence.** Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause.
6. ———. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
7. **Automobiles: Negligence.** A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger.
8. ———: ———. While the driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right-of-way, and is required to accord such to the pedestrian, yet as between intersections the automobile has the right-of-way and the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will violate the rule.
9. ———: ———. This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. The mere fact that a pedestrian walks across a street between intersections contrary to ordinance is not of itself negligence. But, one who does so must necessarily be required to exercise a greater degree of care than one who walks across a street at an intersection or a crosswalk

where protection is afforded by giving the pedestrian the right-of-way.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Collins & Collins and *Story, Pilcher, Howard & Hickman,* for appellants.

Tesar & Tesar, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is a tort action which was originally brought in the district court for Douglas County by Mary Jarosh against George Van Meter, Frank Odorisio, and Richard Murray for the purpose of recovering damages she sustained by reason of injuries suffered in a car-pedestrian accident. Plaintiff recovered a verdict against all of the defendants and judgment was entered thereon. Defendants thereupon filed motions for either a new trial or for a judgment notwithstanding the verdict and have taken this appeal from the overruling thereof.

Appellants Frank Odorisio and Richard Murray contend the evidence adduced at the trial does not show that the panel truck, owned by Odorisio and double parked by his employee Murray, was a proximate cause of the accident and that they are therefore entitled to a judgment notwithstanding the verdict. Appellant George Van Meter contends that the evidence adduced at the trial shows appellee was, as a matter of law, guilty of contributory negligence to a degree that, under the comparative negligence doctrine, it defeats any right she might otherwise have to recover against him and that, by reason thereof, he is entitled to a judgment notwithstanding the verdict. In determining these contentions the following principles are applicable:

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

"A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence." Spracklin v. Omaha Transit Co., 162 Neb. 351, 76 N. W. 2d 234.

"In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

The accident, in which appellee was injured, happened about 3:15 p.m., on December 20, 1957, at a point on South Tenth Street, which is in the city of Omaha, just west of the entrance of Saint Josephs Hospital. Saint Josephs Hospital is located along the east side of

South Tenth Street between Castelar and Martha Streets. In front of the hospital, and along the east curb of South Tenth Street, is an area 95 feet long wherein buses and cabs may stop at the curb to load and unload passengers. It is designated as being for that purpose by signs at each end of the area and by the curb being painted yellow. South Tenth Street, from curb to curb, is 40 feet wide and surfaced with asphalt. It had a white line painted down the center thereof. Martha Street joins South Tenth Street from the west and forms a T intersection. The intersection is about 40 to 50 feet north of where the accident happened. Castelar Street is the first east-west intersecting street to the south of the place where the accident happened. The evidence shows that South Tenth Street is heavily traveled by vehicles and it is also frequently crossed by pedestrians going to and from the hospital. However, the place where appellee attempted to cross was neither an intersection nor a marked crosswalk; in fact, it was in an area located between intersections.

On the day involved appellee, who lives at 2315 South Eleventh Street, had gone to a grocery store on South Tenth Street to buy groceries. After doing so she boarded a bus, northbound on South Tenth Street, to return home. As was her custom she alighted from the bus, after it had stopped in front of the hospital, and waited for it to travel on north before proceeding west across South Tenth Street. As she stood there waiting for the bus to go on to the north she looked both to the north and south to see if any traffic was approaching thereon from either direction in order to determine if it was safe for her to cross. At this time she noticed a panel truck to her left or south was double parked on the east side of South Tenth Street or in the lane for vehicles traveling thereon to the north. This was the truck owned by appellant Odorisio and being driven by his employee appellant Murray. It appears there was a car parked at the curb and that Murray, in the course

of his duties as an employee of appellant Odorisio, double parked the panel truck alongside of this car, parallel thereto and about 1½ feet therefrom.

After the bus had gone on north and after she had looked to see if any traffic was coming from either the north or south on South Tenth Street, appellee proceeded to cross South Tenth Street toward the west at a point about 12 to 15 feet north of the parked panel truck. At about the time this was happening appellant Van Meter was approaching South Tenth Street on Castelar Street driving his 1954 Hudson sedan. At South Tenth Street he stopped at a stop sign and while so stopped he observed the panel truck double parked in the driving lane for northbound traffic. After doing so Van Meter entered the intersection and drove north on South Tenth Street in the driving lane for northbound traffic. As he approached the parked truck he turned to the left to pass it, there being no other traffic from either the north or south at the time.

As he turned to the left to pass the parked truck the left wheels of his car went across the center line of South Tenth Street some 18 inches because the parked truck did not leave him sufficient room to pass it without doing so, its west side being within 6 or 7 feet of the center line of South Tenth Street. Appellant Van Meter could not see through the panel truck because of the nature of its construction, so he was not able to see what was on South Tenth Street in front of it until his car was abreast of it. When it was he saw appellee in the street some 12 or 15 feet ahead of the truck and about 2 feet west of the west side thereof, if extended north. He testified he immediately applied his brakes, which skidded his front tires some 15 feet; that he hit appellee and knocked her to the pavement; that he hit her with his car just to the left of the center of the front end thereof and at a point in the street some 3 feet east of the center thereof; and that he traveled about 4 feet after doing so. Appellee testified she continued to look

both to the north and south as she crossed South Tenth Street but saw no traffic coming thereon from either direction; and that she was looking west when she was hit, which was just to the west of the center thereof, but never saw the car of appellant Van Meter before it hit her.

There is really no dispute in the record except that relating to the point where appellee says she was hit. Appellee testified it was to the west of the center line of South Tenth Street while Van Meter testified it was about 3 feet east thereof.

We shall first consider the contention of appellants. It is, of course, the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. See, Frasier v. Gilchrist, 165 Neb. 450, 86 N. W. 2d 65; Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758; Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

Appellant Murray, by double parking the panel truck of appellant Odorisio, violated certain ordinances of the city of Omaha relating to the use of its streets by vehicles being operated thereon. We have held that such violation is evidence of negligence which a jury is entitled to consider upon the question of whether actionable negligence exists. See, Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Hersh v. Miller, 169 Neb. 517, 99 N. W. 2d 878. And, in this respect, where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages though the act of one of them alone might not have caused the injury. See, McClelland v.

Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384; Shupe v. County of Antelope, *supra.*

However, to be actionable, such negligence must have been a or the proximate cause of the injuries for which damages are sought to be recovered. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619. "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, *supra.* As stated in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117: "It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." However, as stated in Paup v. American Telephone & Telegraph Co., 124 Neb. 550, 247 N. W. 411: "A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his original wrongful act." In Frerichs v. Eastern Nebraska Public Power Dist., *supra,* we said: "In distinguishing between proximate cause and condition this court said in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117: 'To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury

is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.' " As we said in Shupe v. County of Antelope, *supra*, by quoting from Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689: "Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause." Therein we also said, by quoting from Cooley on Torts, § 52, p. 133: "But if the acts or neglects were not concurrent in time, and the party last in fault was chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it."

"Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause." Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551. See, also, Hersh v. Miller, *supra*.

Appellee was fully aware of the parked panel truck before she left the east side of South Tenth Street to cross while appellant Van Meter had become aware of its being parked where it was even before he entered South Tenth Street. Under these circumstances, with the parties being fully aware of the parked panel truck and there being, at the time, no other traffic on South Tenth Street to interfere with their use thereof or to divert their attention, we think the parked truck merely created a condition of which the acting parties were fully aware and in no way was it a proximate cause of the accident in which appellee was injured.

Other jurisdictions, under comparable situations, have come to the same conclusion. See, Geisen v. Luce, 185 Minn. 479, 242 N. W. 8; Powers v. Standard Oil Co., 98 N. J. L. 730, 119 A. 273; DeLuca v. Manchester Laundry & Dry Cleaning Co., Inc., 380 Pa. 484, 112 A. 2d 372; Baker v. Cities Service Oil Co., 321 Ill. App. 142, 52 N. E. 2d 284. As stated in Powers v. Standard Oil Co., *supra*: "In such a situation cause necessarily comprehends an efficient operating force or situation, by intervention or otherwise, without which the accident could not have happened. In this situation the truck was an immobile, inactive instrumentality, incapable in its inactive condition of perpetrating harm or damage. The fact that its reversed situation made its position upon the street at that point a violation of the Traffic law, did not confer upon the truck either activity or force, so as to constitute it an active efficient instrumentality for harm. Its violation of the Traffic law created simply a superadded visible condition upon the street, which was perfectly obvious to the wayfarer, and imposed upon him or her, as a consequence, the necessity for corresponding care or precaution in the use of the highway. For the patent violation of the Traffic law the remedy rested with the constituted municipal authorities, but its actual existence as an obvious fact to be reckoned with could not be ignored by the traveling public, and did not exempt the wayfarer from the exercise of the legal duty of due care under the existing conditions."

Under the circumstances herein disclosed by the evidence adduced we do not think there is any evidence upon which a jury could base a finding to the effect that the parked panel truck was a proximate cause of the accident and, in view thereof, appellants Odorisio and Murray were entitled to have their motion for a directed verdict, based on that contention, sustained and are now entitled to have their motion for judgment notwithstanding the verdict sustained.

We come then to appellant Van Meter's contention

that the trial court should have sustained his motion for a directed verdict because appellee was guilty, as a matter of law, of contributory negligence sufficient, under the comparative negligence doctrine, to defeat any right she might otherwise have to recover against him.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Corbitt v. Omaha Transit Co., *supra.*

We have said that when a pedestrian crosses the street at an intersection, and the same would be true at a marked crosswalk, that: "On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south (right) whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected." Belville v. Bondesson, 130 Neb. 926, 266 N. W. 901. However, as stated in Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64: "A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger." Therein we went on to hold that: "We have come to the conclusion that one who crosses a street between intersections, contrary to the provisions of a city ordinance, is required

to keep a constant lookout for his own safety, and if he fails to so do he is guilty of contributory negligence as a matter of law." See, also, Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613; Wilson v. Wiggins, 155 Neb. 382, 52 N. W. 2d 248.

"While the driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right of way, and is required to accord such to the pedestrian, yet as between intersections the automobile has the right of way and the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will violate the rule." Doan v. Hoppe, *supra.*

Here the evidence shows appellee violated certain ordinances of the city of Omaha by crossing South Tenth Street where she did. However, as stated in Doan v. Hoppe, *supra*: "This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. The mere fact that a pedestrian walks across a street between intersections contrary to ordinance is not of itself negligence. But, one who does so must necessarily be required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right of way." See, also, Trumbley v. Moore, *supra.*

Here the evidence shows appellee was crossing South Tenth Street from east to west at a point between intersections and not where it was marked as a crosswalk. She testified she could not see to the south when she first left the east side of the street, although she looked, because of the parked panel truck which she observed; that she could see to the north but no traffic was coming from that direction, although South

Tenth Street, at this location, is normally heavily traveled by vehicles and also frequently crossed by pedestrians going to and from the hospital; that she continued to look both north and south and did so at a point where she could see past the parked panel truck but saw no traffic coming from either direction; that she then continued on west across the street and was hit by appellant Van Meter's car after she had crossed the center line, not having seen the car before it hit her; and that she was looking west at the time she was hit. Appellant Van Meter testified that after he had turned his car to the left to pass the parked panel truck he could not see ahead of the truck before he came abreast of it because of the nature of the truck's construction; that when he came abreast of the truck he saw appellee going west across South Tenth Street some 12 or 15 feet ahead of the truck; that when he saw her she was some 2 or 3 feet west of a line extended north from the west side of the parked truck; that he immediately applied his brakes and slid his front tires, which left tracks on the pavement for a distance of 15 feet; that he could not avoid hitting appellee; that he hit her with the front of his car when she was some 3 feet east of the center line of South Tenth Street; and that his car traveled forward a distance of 4 feet after hitting her.

The only dispute in the evidence relates to where appellee was with reference to the center line of South Tenth Street when she was hit. There is no evidence that appellant Van Meter's car was being driven at an unreasonable rate of speed under the circumstances. In fact, the evidence adduced would indicate he was traveling at a reasonable rate of speed. There was no other traffic on South Tenth Street at the time to divert the attention of either appellee or appellant Van Meter. Appellee testifies that when she got to where she could look past the parked truck to the south that she did so but saw no car approaching from that di-

rection. Under the undisputed evidence adduced appellant Van Meter's car had then turned out to pass the parked truck and had to be in plain sight. Appellee cannot excuse her failure to see this car approaching from the south merely by saying she looked and did not see it. She was duty bound to look and see what was in plain sight. Her failure to do so and then stepping out in front of the oncoming car at a time and place when the driver thereof could not avoid hitting her was contributory negligence of such a degree that it defeated, as a matter of law, any right she might otherwise have against appellant Van Meter. In view thereof, appellant Van Meter's motion for a directed verdict, based thereon, should have been sustained and he is now, by reason thereof, entitled to have his motion for a judgment notwithstanding the verdict sustained.

Appellants raise two contentions relating to their motions for new trial which have merit. However, in view of what we have herein said and held it would serve no useful purpose to discuss them. We reverse the judgment of the trial court and remand this cause to it with directions to enter a judgment for the appellants in accordance with our opinion, taxing all costs to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

MARTIN WARE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
105 N. W. 2d 570

Filed October 21, 1960. No. 34797.

1. **Rape.** In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime charged and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction of the accused.

2. ———. It is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense, but it is indispensible that she be corroborated as to facts and circumstances which tend to support her testimony as to the principal fact in issue.
3. **Criminal Law.** Where time is not an ingredient of a crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations.
4. ———. Where the undisputed evidence shows that the criminal act charged, if committed, was not barred by the statute of limitations, a failure to instruct as to the statute of limitations is not prejudicially erroneous.
5. ———. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

W. D. O'Shaughnessy, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The defendant below was convicted of the crime of statutory rape, charged to have been committed on or about December 28, 1958, upon Patty Lou Kinney, a female child of the age of 12 years. The plaintiff in error, hereafter referred to as the defendant, was sentenced to serve 5 years in the State Penitentiary. He seeks a review by petition in error to this court.

The prosecutrix testified that she was born on September 19, 1946, and was 12 years of age on the date of the alleged offense. Her testimony is that she attended a picture show with the defendant, his wife, and small son on the evening of December 28, 1958, and after the show, at about 11:30 p. m., she went to their one-room

apartment with them. She testified that defendant, with the assistance of his wife, forcibly had sexual relations with her at that time. Defendant and his wife thereafter accompanied her to her home. Prosecutrix made no complaint to anyone until she discovered that she was pregnant. She gave birth to a child on September 21, 1959. The defendant and his wife deny the act charged on December 28, 1958. The defendant admitted to two police officers that he had sexual relations with the prosecutrix in an automobile at the rear of his home a few days after Christmas, 1958. He gave a written statement to this effect to the deputy county attorney and to a court reporter who reduced it to writing. At the trial defendant testified that he had never had sexual relations with the prosecutrix and that he had admitted it to the police and given a written statement admitting it because he desired to protect his wife from a charge of rape, pending against her.

The defendant contends that his motion for a directed verdict should have been sustained, primarily because the act charged on December 28, 1958, was not corroborated. In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime, and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction. Peery v. State, 163 Neb. 628, 80 N. W. 2d 699. While the testimony of the prosecutrix was most unusual, and was given after she admitted she was mad at defendant's wife, yet the admission made by the defendant to two police officers and the written admissions given to the deputy county attorney and to the court reporter are corroborative of the charge. The fact that the prosecutrix gave birth to a child within the period of gestation is also corroborative to some extent. It is true that the defendant denied the truth of the admissions at the trial, but this creates a question for the jury to determine as to which time he was telling the truth.

The evidence of the prosecutrix that defendant had sexual relations with her on or about December 28, 1958, when she was 12 years of age is sufficiently corroborated to sustain a conviction. Miller v. State, 169 Neb. 737, 100 N. W. 2d 876; Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380; Hudson v. State, 97 Neb. 47, 149 N. W. 104.

Defendant contends that the trial court erred in giving instruction No. 10. By this instruction the court instructed the jury that under the evidence in this case the date of the offense is not an essential element in the crime of rape as charged in the information. Ordinarily the court is required to charge that the crime was committed on the date charged, or within the time limited by statute for the prosecution of the offense. Sledge v. State, 142 Neb. 350, 6 N. W. 2d 76; Rema v. State, 52 Neb. 375, 72 N. W. 474; Palin v. State, 38 Neb. 862, 57 N. W. 743.

In the instant case the trial court did not instruct that the jury must find that the act charged was committed within 3 years of the date charged in the information. The undisputed evidence shows that prosecutrix had known the defendant for only 7 months prior to the date the offense was charged. The defendant admits that he had known prosecutrix since the preceding summer. Under this evidence the offense charged could not have occurred at a time when the 3-year statute of limitations would have application. Under such a situation it is not prejudicial to the defendant for the trial court not to instruct with reference thereto. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649.

The defendant contends that the sentence of 5 years is excessive. The statutory penalty for the offense charged is from 3 to 20 years in the penitentiary. There is nothing in the record to indicate an abuse of discretion by the trial court. Under such circumstances the rule set forth in Miller v. State, *supra,* is controlling.

We find the record to be free from error prejudicial

to the rights of the defendant, and the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE PRESCRIPTION OF REASONABLE RATES AND CHARGES FOR MOTOR CARRIERS OF PROPERTY FOR HIRE.
L. E. WHITLOCK TRUCK SERVICE, INC., APPELLANT, V. SHIPPERS OIL FIELD TRAFFIC ASSOCIATION, APPELLEE.
105 N. W. 2d 588

Filed October 21, 1960. No. 34808.

1. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier under the provisions of section 75-241, R. S. Supp., 1959.
2. ———: ———. Where the evidence is in conflict in a hearing before the Nebraska State Railway Commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts.
3. **Public Service Commissions.** An order of the Nebraska State Railway Commission which ignores the undisputed or admitted facts and a proper application of the law to such facts is arbitrary and unreasonable.
4. **Public Service Commissions: Appeal and Error.** Rulings of the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska State Railway Commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce.
5. **Public Service Commissions: Motor Carriers.** An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service.
6. **Public Service Commissions: Appeal and Error.** An order of the Nebraska State Railway Commission that is arbitrary and unreasonable will be vacated and set aside on appeal to this court.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

Nelson, Harding & Acklie, for appellant.

Robert E. Powell and *Philip Bolian*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission denying the application of L. E. Whitlock Truck Service, Inc., for an increase in the motor vehicle common carrier rates and charges for the transportation of oil-field equipment, commodities, and supplies in Nebraska intrastate commerce. The primary issue is whether or not the proposed rates and charges were fair and reasonable for the transportation of such commodities in intrastate commerce.

The authority of the commission to prescribe reasonable rates and charges for the transportation of property by common carrier is contained in section 75-241, R. S. Supp., 1959. The record shows that the application was denied after notice was given and a hearing held. It is the contention of the applicant that the order of the commission denying his application is arbitrary, unreasonable, and contrary to law. In this respect it is the rule that where there is evidence supporting factors which are inconsistent or in conflict with other recognized factors, the power to decide ordinarily rests with the commission and not the courts. Under such circumstances this court will not substitute its judgment for that of the commission. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331; Chicago, B. & Q. R.R. Co. v. Herman Bros., Inc., 164 Neb. 247, 82 N. W. 2d 395. The powers of the commission may not, however, be whimsically exercised. The commission may not disregard undisputed or admitted facts, although it may resolve con-

flicts in the evidence. The exercise of power by the commission without a proper application of the law to undisputed or admitted facts is an arbitrary exercise of power which the courts are required to correct. Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312.

Applicant's evidence is substantially as follows: L. E. Whitlock Truck Service, Inc., has assets of $647,260.73. In 1959 the revenue received for all services rendered as a common carrier amounted to $1,238,905.20. The total cost of operation was $1,321,829.26. The loss sustained for the year, including interest and other nonoperating expenses, was $103,680.91. The ratio of revenue to expense was 100 to 108.04. This indicates a loss of 8.04 cents on each dollar expended.

Objection was made to an item of expense in the amount of $18,000 for uncollectible revenue. The evidence shows that this was in fact a reserve fund created at the rate of $1,500 a month to apply against uncollectible revenue at the close of the accounting year. No accounting had been had at the time of the hearing and there was no evidence of facts or past experience that would justify the item of $18,000 as an expense. Applicant admits the nature of the item and that it is an improper charge to the extent that it exceeds the amount of uncollectible revenue. Under the circumstances shown in the record the $18,000, or any part thereof, was not established as a proper item of expense. Applicant's claimed loss should be reduced by $18,000, leaving applicant's gross loss at the figure of $85,680.91, according to its own records. The operating loss of the applicant, exclusive of interest on current and equipment obligations less other income amounting to $20,756.85, is $64,924.06.

The record shows that applicant has intrastate authority in Nebraska, Oklahoma, Kansas, Colorado, and South Dakota, and interstate authority between points in Oklahoma, Kansas, Nebraska, South Dakota, North

Dakota, Wyoming, Colorado, and Utah. The evidence shows that in April 1959, applicant sold its intrastate business in Kansas for a substantial sum, reserving its interstate rights and some minor intrastate authority. The amount so received was not included in applicant's balance sheet showing the operational loss hereinbefore indicated. The objector appears to argue that this is a matter to be considered in determining whether or not an increase in rates and charges should be granted. The record also shows that applicant purchased the operating rights and business of a competitor at Sidney, Nebraska, in January 1959. We fail to see where the sale in Kansas and the purchase in Nebraska are material to the issue before the commission, particularly if the more applicable formula to be used is the ratio of revenue to expense as the parties seem to agree.

In relating expense of operation to revenue for the purpose of obtaining a rate increase for a common carrier, an efficient operation of the carrier's business is contemplated. It stands to reason that inefficient management or operation cannot afford a basis for an increase in rates and charges for the transportation of designated commodities by all common carriers transporting the same commodities under the same conditions. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

The objector contends, although no proof was offered by it, that applicant's expense for maintenance and repairs was excessive because of a lack of competence on the part of applicant's truck drivers and drivers' helpers. The applicant admits however that there is merit in this assertion. The evidence shows that applicant had 40-odd trucks domiciled in Nebraska, some of which had a carrying capacity of 36,000 to 38,000 pounds. The evidence further shows that oil drillers and oil producing companies pay a much higher rate of pay to truck drivers and drivers' helpers than applicant can pay under existing rates and charges. This results in

a large turnover in truck drivers and helpers and a reduced efficiency in the operation of his trucks, which bears directly upon the cost of their maintenance. Whitlock testified that if the requested increase in rates and charges were allowed by the commission, a portion of it would be used to raise the rates of pay of drivers and helpers, and to establish a training program for them which would tend to reduce the maintenance costs on this expensive equipment. It is the contention of the applicant that unless a compensatory rate structure is fixed by the commission such costs cannot be assumed and that, as an alternative, it would discontinue the service before losses absorbed the assets of the company. It may be pointed out in this connection that the commission has established no formula for ascertaining the ratio of operating revenue to operating expenses in this type of operation. The amount spent for maintenance by the applicant in 1959 is not questioned. Applicant states that it was abnormally high because of unusual climatic conditions during the early months of 1959. Whitlock testified that the first 4 months of 1959 were the worst with which he had ever contended and that these conditions did bring about abnormal maintenance. He testified that this application for a 10 percent increase in distance rates and the varying percentage of increases and charges for labor and accessories did not take into consideration the additional expenses growing out of the unusual climatic conditions in 1959 and, if they were proper to be included, an increase of rates and charges by 20 percent would be required. While the exhibits offered in evidence appear to include all expenses of the applicant, including the unusual maintenance expense in early 1959, the amount of the increase requested would not cover such additional operational costs and return an adequate compensation to the applicant for the service rendered. We point out that by giving the evidence its most favorable import to the objector, that is, by dis-

allowing the $18,000 uncollectible revenue item as an expense and disregarding interest costs and other income during the year, the operating loss would be $64,924.06. This involves a ratio of revenue to expense of 100 to 105.2.

There appear to be two methods used in calculating whether or not a rate will yield an adequate return. The first method is to provide a reasonable return upon the amount of the investment. The second method is by the operating ratio rule, a ratio of operating revenue to operating expenses. The reasoning for the application of the ratio rule is set out in County Board of Arlington County, Va. v. United States, 101 F. Supp. 328. It is usually applied where revenue and expense is greatly in excess of the capital investment. The railway commission of this state has not adopted a rate-fixing formula for the class of cases we have before us. It is evident from the record that it considered the ratio method in the instant case and the parties apparently are in accord that it affords the proper formula. While we have no established ratio by the commission which can be said to provide for a reasonable rate in such cases, the matter has been before the Interstate Commerce Commission. While the holdings of that body are not necessarily controlling, they may properly be considered under our holding in Preisendorf Transport, Inc. v Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865. In Fares, Motor, Between Northern Kentucky and Cincinnati, 62 M. C. C. 67, an operating ratio of 100 to 92 before income taxes was held to be reasonable. In Transcontinental and Western Increases, 61 M. C. C. 755, a ratio of 100 to 93 was approved as the basis for a reasonable rate. This leads us to the conclusion that under the evidence in this case that was not in dispute, an increase in rates was required and the refusal to increase them was arbitrary. This is necessarily based on the evidence that the relation of operating revenue to operating expense in the ratio

of 100 to 93 will produce a compensatory return.

The objector produced evidence of oil drillers and producers who object to the increased rate application for the reason that it will increase their costs which are already high. These witnesses represent companies which provide approximately 5.06 percent of applicant's intrastate revenue in Nebraska. They admit that applicant should be permitted a rate that would return a reasonable profit. The mere fact that it will increase their costs of operation is not a controlling factor since an increase in transportation rates always increases the cost to users of the service. Some 20 users of the service provided by applicant indicated their support of the application, 2 of them having representatives present to testify. These users of the service provide 64.81 percent of applicant's intrastate revenue in Nebraska. Their evidence may be summarized as follows: Their companies are in business to make a profit and they agree that applicant is likewise entitled to a reasonable profit from its operations. They freely admit that they desire this needed service at as low a rate as they can obtain it. They testify to added considerations. Whitlock testified applicant had 40-odd large trucks. They testify that applicant could "rig down," transport, and "rig up" a 500,000 pound drilling rig in one movement in one day. It requires 15 trucks for such a movement and the applicant usually has them available. The 15 trucks so used had an original cost value of approximately $315,000. The two competitors in the field have less equipment and are not ordinarily in a position to transport the larger oil drilling rigs with the efficiency and dispatch as the applicant. The evidence is that these companies are faced with a $700 daily expense which can be saved in certain instances by using applicant's equipment. In other words, they prefer to support applicant's request for an increase to an abandonment of its service because of the resulting savings to their companies.

Applicant's two competitors, whom we shall refer to as Neff and Gettel, did not appear for or against the application. The objector asserts this is a circumstance for a denial of the increase. The evidence shows that applicant, Neff, and Gettel filed a joint application for a rate increase which was heard by the commission on September 22 to 25, 1959, and denied on October 2, 1959. The evidence shows that applicant invited them to join in the present application but, not hearing from them, concluded to make application on its own. Why neither party called Neff or Gettel to testify is not shown by the record. The inference to be drawn from this, if any proper inference is warranted, is that Neff and Gettel deemed existing rates noncompensatory in view of their previous action in the matter.

It is contended that the requested rates, if granted by the commission, would be discriminatory as to Nebraska interstate users of the service. The evidence shows that the intrastate rates in neighboring states and the interstate rate are for all practical purposes the same as the existing intrastate rates in Nebraska. From this it is argued that a presumption of the reasonableness of the Nebraska rates arises. It is further argued that the Nebraska commission, if it raised the Nebraska rates and charges, would as a matter of law impose a discriminatory rate as to interstate users in Nebraska and intrastate users in neighboring states. We see no merit in this contention. An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. Chicago, Milwaukee, St. Paul & P. R. R. Co. v. State of Illinois, 355 U. S. 300, 78 S. Ct. 304, 2 L. Ed. 2d 292. Such a contention if adopted by the Interstate Commerce Commission and neighboring state regulatory commissions would result in a freezing of established rates and charges from which there could be no escape irrespective of the evidence. Such is not the law. Whitlock testified that applicant is filing or

has filed similar applications before the other commissions but, because the major part of its revenue is derived in Nebraska, it elected to first present its application to the Nebraska commission. We find nothing in the record that limits its right to so proceed.

We hold that a grant of an increase in rates and charges required by the evidence in such a case as we have before us would not be unlawful as being discriminatory. While the existing rates for the same service in other jurisdictions may create a presumption of reasonableness, such a presumption may be overcome by evidence.

A common carrier is bound to carry at equal rates for all customers in like condition and, ofttimes what appears to be an economic discrimination is not an unjust discrimination inhibited by sections 75-501 and 75-502, R. R. S. 1943. When competitive conditions are different, different rate levels can be justified without subjecting them to a charge of unjust discrimination. Consequently a state commission may properly fix reasonable rates calculated to return a reasonable profit for the services rendered, even though they exceed established interstate and intrastate rates in other jurisdictions; provided, of course, that the evidence sustains the rate because of the existing circumstances and operating conditions. Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *supra;* Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

We conclude that the Nebraska State Railway Commission is authorized to prescribe reasonable rates and charges for the transportation of oil-field equipment, commodities, and supplies in Nebraska intrastate commerce. We further conclude that the undisputed evidence in this case, under a proper application of the law, requires that an increase in rates be granted for the performance of the services designated in the application and that the order denying the application is arbitrary and unreasonable. We likewise hold that an order

granting an increase in common carrier rates on specified commodities is not ipso facto discriminatory merely because it exceeds the interstate rate or the intrastate rates of neighboring states.

It is not the province of this court on an appeal from the Nebraska State Railway Commission to fix rates for common carriers. That is the exclusive function of the commission. If an order made by the commission is arbitrary and unreasonable in that it fails to properly apply the law to undisputed evidence the court may properly so declare and set aside such order. The order of the commission denying the applicant relief in the instant case is therefore set aside as arbitrary and unreasonable.

REVERSED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT MORSE, APPELLEE, IMPLEADED WITH MARK B. TINSLEY ET AL., APPELLANTS.
105 N. W. 2d 572

Filed October 28, 1960. No. 34795.

1. Bail. If the surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited.
2. ———. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond.
3. ———. A judgment rendered on account of a forfeited bail bond may not exceed the amount of the penalty of the bond.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded.*

Heiss & Lammers and *Webb, Kelley, Green & Byam,* for appellants.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Mark B. Tinsley and Earlene Tinsley were charged with the possession by them in Scotts Bluff County of tools suitable for breaking and entering with the intention to use them for a burglarious purpose. The offense ascribed to them was a felony. § 28-534, R. R. S. 1943. The county court of Scotts Bluff County, in which proceedings were initiated, required the accused to appear in the district court for that county and fixed bail for each of the accused in the sum of $5,000 for his and her release respectively from custody. The accused each tendered an appearance bond in that amount executed by them respectively as principal and signed by the Summit Fidelity and Surety Company as surety. The bonds were accepted, approved, and filed by the county court and accused were thereupon released from custody.

Mark B. Tinsley and Earlene Tinsley will be referred to herein as accused except when they and the Summit Fidelity and Surety Company are spoken of collectively they will be designated appellants. State of Nebraska will be designated appellee.

The condition of each of the bonds was that the accused named therein would personally appear in the district court for Scotts Bluff County on the first day of the next jury term of that court and from time to time as ordered by it until the final determination of the cause and that accused would not depart the court without leave.

The first day of the next jury term of the district

court for that county after the bonds were furnished and approved was July 13, 1959. Transcript of the proceedings had in the cause in the county court was filed in the district court June 9, 1959, and on that date an information charging the accused with the crime described above was filed in the district court. The accused or either of them did not appear in the district court July 13, 1959. The accused were located and taken into custody at South Gate, Los Angeles County, California, shortly before December 7, 1959. They were returned to Scotts Bluff County by representatives of the surety and were arraigned in the district court on that date on the charge above described. The district court, on motion of the county attorney made on behalf of appellee, found a breach of each of the bonds furnished by the accused and adjudged a forfeiture of each of them. Thereafter the district court held a hearing at which the interested parties introduced evidence and presented arguments, at the conclusion of which the court found that judgment should be rendered on the two bonds against appellants for the sum of $9,500 and that the surety should be granted a reduction of the total of the two bonds of $500 on account of expenses of the surety in returning the principal in each of the bonds from Los Angeles County, California, to Scotts Bluff County, Nebraska. A judgment was rendered by the district court against appellants for $9,500 on the appearance bonds furnished by the accused because of their default in failing to perform the requirements of the bail as above recited and the forfeiture of the bail as previously adjudged by the district court. Their motion for a new trial was denied and from that ruling they have prosecuted this appeal.

There is no issue of fact in this case. The existence, validity, effectiveness, and breach of each of the bonds were established. The accused or either of them did not appear in or attend court as the bonds required. The principals in the bonds were then fugitives from

justice attempting to escape detection by officers of the law and they were successful in that respect for a period of about 6 months. A case for forfeiture of each of the bonds and judgment for the penalty of each thereof was complete. It is provided by statute that if there is a breach of condition of a bail bond, the court shall declare a forfeiture of the bail; and when a forfeiture has been had, the court shall, on motion, enter judgment and execution may issue thereon. §§ 29-1106 and 29-1108, R. R. S. 1943.

If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Honey, 165 Neb. 494, 86 N. W. 2d 187.

Appellants argue that the judgment rendered herein is void because it is in excess of the jurisdiction of the district court. It was stipulated by appellee and appellants that a hearing of the motion for judgment on the order of forfeiture of the bonds of Mark B. Tinsley and Earlene Tinsley should, without notice to appellants or any of them, be held commencing at 10 o'clock on the morning of January 9, 1960. The hearing was held at that time and the judgment was rendered that day. There were present the county attorney of Scotts Bluff County representing appellee, the attorney representing the appellants, and an officer of the surety.

They all participated in the hearing. The bail bonds were furnished, accepted, and filed in the case. The district court had jurisdiction of the subject matter and of the parties interested in the proceeding for the forfeiture of the bonds and the entry of judgments for the liability thereon. The argument of appellants in this respect is incorrect. Section 29-1106, R. R. S. 1943, directs: "When there is a breach of condition of a recognizance, the court shall declare a forfeiture of the bail." Section 29-1108, R. R. S. 1943, provides in part: "When a forfeiture of a recognizance has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond, the obligors submit to the jurisdiction of the court * * *. The liability upon the bond may be enforced on motion without the necessity of an independent action."

The accused each separately furnished a bail or appearance bond of $5,000. Mark B. Tinsley was not a party to, had no connection with, and was not liable for any amount on the bond given by Earlene Tinsley. Likewise she was not interested in or liable for any amount of the bond furnished by Mark B. Tinsley. The liabilities of the accused were several and not joint. Appellants say the joint judgment against them is void as to the principal named in each of the bonds respectively because the liability of each principal was not in excess of $5,000 but the court rendered judgment against each of them and the surety for $9,500.

The motion of appellants for a new trial separately specified: (1) Error in the assessment in the amount of the recovery in that it is too large, being based upon both bonds; (2) that the decision is not sustained by the evidence; and (3) that the decision is contrary to law. A judgment against Mark B. Tinsley on account of the bond furnished herein by him could not legally have been for more than $5,000, the amount of the penalty of the bond. Likewise a judgment against Earlene

Tinsley on account of the bond furnished by her herein could not legally have been for more than $5,000, the amount of the penalty of her bond. The rendition of a judgment herein for $9,500 against each of the accused was incorrect as to the amount of the recovery, was not sustained by evidence, and was contrary to law. The judgment being erroneous as to each of the principals cannot be sustained as to the surety. There should have been a judgment on the bond furnished by Mark B. Tinsley against him and the surety thereon for an amount not in excess of the penalty of the bond and a separate judgment on the bond furnished by Earlene Tinsley against her and the surety thereon for an amount not in excess of the penalty of the bond. A judgment on account of a breach of the condition of a bail bond may be rendered for the full amount of the penalty of the bond but not for more.

In People v. Parisi, 217 N. Y. 24, 111 N. E. 253, Ann. Cas. 1916C 111, the court said: "This recognizance is executed under a statute for the purpose of securing and insuring the performance of an act and not for the payment by the principal of moneys and in such a case the general rule seems to have been early established both in England and in this state that the recovery should be limited by the penalty."

In United States v. Broadhead, 127 U. S. 212, 8 S. Ct. 1191, 32 L. Ed. 147, it is stated: "These cases are suits brought upon two bonds given by John F. Broadhead and his sureties, conditioned for his appearance in the District Court of the United States for the District of California, to answer two separate indictments for making and forging checks on the Assistant Treasurer of the United States at San Francisco. The penalty of each of these bonds was $5000, and, according to well settled principles, no interest can be recovered in such a suit as this, nor can any recovery be had beyond the amount prescribed in these instruments, except for costs."

It is declared in Empire State Surety Co. v. Lindenmeier, 54 Colo. 497, 131 P. 437, Ann. Cas. 1914C 1189: "It is a general rule, and well settled, that sureties are liable only to the extent of the penalty of the bond."

People v. Hanaw, 106 Mich. 421, 64 N. W. 328, was an action on a recognizance furnished by Joseph Gregory upon an information which charged him with the offense of breaking and entering in the nighttime a certain shop with intent to commit larceny. Concerning the judgment which was rendered on the recognizance the court said: "We think error was committed in entering judgment for interest on the amount of the recognizance from the date of forfeiture. * * * The judgment will be modified, and a judgment entered in this court for the penalty of the bond, $600, and costs of the court below." See, also, 8 C. J. S., Bail, § 106, p. 210; 6 Am. Jur., Bail and Recognizance, § 221, p. 156.

The judgment should be and it is reversed and the cause is remanded to the district court for Scotts Bluff County for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

JOHN STOLLER ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT.
105 N. W. 2d 852

Filed October 28, 1960. No. 34798.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. **Statutes.** A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enact-

ing clause or of excepting something from its operation which would otherwise have been within it. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.

4. **Contracts: Statutes.** Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.
5. **Public Lands.** The rights of a lessee of school lands are determined by the law as it was at the time the lease was made and the lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.
6. **States.** The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.
7. **Public Lands: Mines and Minerals.** Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, the fact that after said contract of sale was given the Constitution of Nebraska was amended, making it illegal to deed any mineral rights on school land, would not prevent the state from conveying said land under the terms of the original contract.
8. ———: ———. The acceptance and recording by a vendee of a deed from the Governor of the State of Nebraska, conveying a portion of the state's common-school lands, and containing mineral reservations, which reservations were unauthorized and invalid, will not estop such vendee from afterwards demanding a proper deed of conveyance without such invalid reservations or having his title quieted against such reservations.

APPEAL from the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Clarence S. Beck, Attorney General, and *Richard H. Williams*, for appellant.

Fred T. Hanson, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, John Stoller and Lydia Stoller, brought this action against defendant, State of Nebraska, seeking to quiet title to the oil, gas, and mineral rights on described school lands allegedly owned by plaintiffs in Red Willow County, and to enjoin defendant from asserting any rights therein. Defendant filed an answer to plaintiffs' petition, and plaintiffs demurred generally thereto. The demurrer was sustained and, defendant having elected not to plead further, a judgment was rendered in favor of plaintiffs and against defendant which quieted the title in plaintiffs as prayed. Thereupon defendant appealed to this court, assigning that the trial court erred in sustaining plaintiffs' demurrer and rendering judgment for plaintiffs. We do not sustain the assignment.

The sole question presented is one of law, arising out of the judicial construction and application of certain statutes under admitted facts. More particularly, the question is whether the statutory right given a contractual purchaser of school lands to redeem, and his timely exercise of such right after declared forfeiture of such contract by the Board of Educational Lands and Funds, creates a new contract of purchase under statutes then existing, or simply restores to and preserves in the purchaser his original vested contractual rights.

In that connection, plaintiffs' petition as summarized alleged that they were owners of described school lands as tenants in common; that on or about November 22, 1892, such lands were leased by defendant in writing as provided by law to one Josef Kroupa, which lease was duly approved by and is of record in the office of the Board of Educational Lands and Funds, hereinafter called the board; that at the time said lease was executed, statutes were in force and a part of said lease which provided that lessees of school lands should have a right or option on application and surrender of such lease to purchase the leased lands for their appraised value, but

at not less than $7 per acre, and obtain fee simple title thereto, which became a vested right of lessee, his successors, and assigns; that on or about September 4, 1899, lessee Josef Kroupa sold and assigned said lease in writing to Jacob Fichtner for valuable consideration, which assignment was duly approved by and is of record in the office of the board; that on or about January 21, 1908, Jacob Fichtner sold and assigned said lease in writing to G. H. Fichtner for valuable consideration, which assignment was duly approved by and is of record in the office of the board; that on or about August 25, 1917, G. H. Fichtner, being the owner of said lease by said assignments, duly made application to purchase said lands under such right or option; that he surrendered said lease, and on said date two written certificates or contracts of sale were duly executed and delivered to him covering the described lands here involved, which are of record in the office of said board; that contrary to law and the vested rights of G. H. Fichtner as assignee of said lease and option to purchase a fee simple title free of all reservation, there was inserted in each of said certificates of sale a reservation to the state of all oil, gas, and designated minerals on said lands; that on or about March 9, 1937, G. H. Fichtner and wife, Olga Fichtner, sold and assigned said contracts in writing to the Department of Banking of the state for valuable consideration, which assignments were duly approved by and are on file in the office of said board; that on or about March 29, 1937, the Department of Banking duly sold and assigned said certificates of sale and its rights thereunder in writing to plaintiff John Stoller, for valuable consideration, which assignments were duly approved by and are of record in the office of the board, whereby plaintiff John Stoller became owner of the rights of the lessee and his assigns under said option and the rights of the purchaser under the sales made pursuant thereto; that prior to April 8, 1946, said John Stoller completed all payments

required to be made under the contracts of lease and purchase and applied for a deed to the land requesting same to vest title in plaintiffs as joint tenants with right of survivorship; that in response to such application, the state issued and delivered plaintiff a deed designating "John Stoller and/or Lydia Stoller" as grantees, without express language of joint tenancy or survivorship, which cast a cloud on and rendered doubtful the nature of the title intended to be conveyed and vested in grantees; and, that contrary to law and the vested rights of plaintiff John Stoller as assignee to have conveyed to him or to the persons designated by him a fee simple title free of all reservations, the deed issued by the state on April 8, 1946, a copy of which was attached to and made a part of plaintiffs' petition, contained a provision reserving in the state all coal, oil, salt, mineral, and other natural resources. Plaintiffs' prayer was for a judgment quieting title to such oil, gas, and mineral rights in plaintiffs, and declaring them to be owners of said lands as joint tenants with right of survivorship.

Defendant's answer admitted all allegations of plaintiffs' petition except as allegations thereafter made by defendant might tend to controvert same, in which event they were denied. Defendant then alleged that on May 11, 1936, the board, by order pursuant to notice, as provided by law and duly spread upon its official records, declared a forfeiture of the sale contracts theretofore issued to G. H. Fichtner on or about August 25, 1917; that by virtue of statutes then existing, the interest in the land covered by such contracts reverted to the state the same as though no sale had ever been made; that on or about March 10, 1937, pursuant to a statutory right then existent, the purchaser or his assignee, the Department of Banking, paid all delinquencies and interest which had accrued with respect to payments on such sale contracts and redeemed same, which redemption was duly noted and recorded on

the official records of the board; and that by virtue of the forfeiture of 1936 and the redemption of 1937, new sale contracts for purchase of the land involved came into being and were subject to a 1920 amendment of the Nebraska Constitution, Article III, section 20, which prohibited alienation of the mineral rights on state educational lands. Defendant prayed for a judgment quieting title in it to the oil, gas, and mineral reservations inserted in plaintiffs' deed, and prayed for a denial of the relief sought by plaintiffs except with regard to their prayer for an order finding that plaintiffs as grantees in the deed should be held to be joint tenants with right of survivorship.

In the judgment rendered by the trial court sustaining plaintiffs' demurrer to defendant's answer and quieting title to plaintiffs as prayed by them, the court found and adjudged that the declaration of forfeiture alleged in defendant's answer was subject to the right of redemption; that the redemption so prayed had the legal effect of restoring plaintiffs' predecessor in title to all the rights such purchaser had prior to such declaration of forfeiture; that such rights were prior to and not subject to the Constitution of 1920; and that therefore defendant's answer did not constitute a defense to any relief sought by plaintiffs. In that connection, defendant's contention and argument were and are that upon declared forfeiture by the board all interest in the land covered by the lease and contract of sale reverted or turned back to the state, the same as if "such lease or sale had never been made"; that to "redeem" means a "buying back" or a "repurchase"; that "redemption" after declared forfeiture created new contracts of purchase rather than a restoration or preservation of the original contracts; and that since such new contracts came into existence after 1920, then Article III, section 20, Constitution of Nebraska, which prohibited the state from alienating the oil, gas, and mineral rights in making

such contracts, had application and controlled in the situation presented.

Upon such premise also, defendant relied upon section 72-219, Comp. Stat. 1929, as amended by Laws of Nebraska, 1935, Chapter 163, section 12, page 605, which provides in part: "If the amounts due are not paid within ninety days from the date of the service of such notice, the contract of lease or sale may be, by said board, declared forfeited and the lands therein described shall revert to the state the same as though such lease or sale had never been made. * * * Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies, fees and costs of forfeiture at any time before the advertising of such land to be leased at public auction is completed: * * *."

However, as we view it, such statute has no application here, and assuming, for purpose of argument only, that it did, no contention is alleged or made by defendant that "all delinquencies, fees and costs of forfeiture" were not paid before the "advertising of such land to be leased at public auction" was "completed," as provided in the 1935 act, or were not paid before "such land" was "advertised to be leased at public auction," as provided by section 72-219, Comp. Stat. 1929, as it existed prior to the amendment of 1935.

As we view it, section 3831, Cons. St. 1891, is applicable and controlling in this case. Such section and others in pari materia therewith were in force and a part of the lease contract here involved, which was executed on November 22, 1892, and gave the lessee a right or option to purchase such lands as claimed by plaintiffs. Section 3831, Cons. St. 1891, provides in part: "If any lessee of educational lands shall be in default of the semi-annual rental due the state for a period of six months, or any purchaser of educational lands be in default of the annual interest due the state for one year, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that,

if such delinquency is not paid within six months from the date of the service of such notice, his lease or sale will be declared forfeited by the board of educational lands and funds. If after such notice the amounts due are not paid within six months from the date of the service of such notice thereof the said contract of lease or sale may be declared forfeited; and the lands therein described shall revert to the state the same as though such lease or sale had never been made; and the order making such forfeiture shall be spread upon the records of the board of educational lands and funds. * * * The forfeiture may be entered by said board after ninety days from the date of such published notice. * * * Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs at any time before such land is again sold or leased."

In that connection, defendant does not allege or claim that either plaintiffs or their predecessors did not pay all "delinquencies and costs at any time before" such land was "again sold or leased." As a matter of fact, defendant admits otherwise and, upon application, as provided by law and the contracts involved, defendant admittedly deeded the land to plaintiffs after all payments required to be made under the contracts of lease and sale had been completed.

In Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366, this court concluded that a proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause or of excepting something from its operation which would otherwise have been within it. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.

Under section 3831, Cons. St. 1891, it is the "contract of lease or sale" that is "declared forfeited" by and

"spread upon the records of the board" which the owner thereof "may redeem * * * by paying all delinquencies and costs at any time before such land is again sold or leased." The land itself reverts to defendant absolutely, "the same as though such lease or sale had never been made" only after failure of the owner to redeem the contracts by paying all delinquencies and costs within such prescribed time. When that is timely done, the declared forfeiture is of no force and effect and all of the owner's theretofore-existing contractual rights are restored to and preserved in him as if there had been no delinquencies thereunder. In other words, the right to redeem granted in a contract to lease or purchase school lands under the statutes here involved, which are a part of such contracts, is a vested right of the lessee or purchaser to restore himself to the same position he was in thereunder prior to default and declared forfeiture. We have not been cited, and upon diligent search we have not found, any authority which would permit any other conclusion.

In that connection, the term "redeem" has more than one meaning in law, which may vary under different conditions dependent upon the context in which it is used. It may imply the existence of a debt and the right to pay the obligation rather than a repurchase or sale. It has been defined as meaning to receive back by paying the obligation, or to recover or regain by the fulfillment of some obligation, as by the payment of a debt due. The term as used in the statute here involved may and should be so defined. See, 76 C. J. S., Redeem, p. 175; 53 C. J., Redeem, p. 663, and authorities cited. Also, contrary to defendant's contention, the term "redemption" may be employed in the sense of paying back or satisfying a party's indebtedness rather than with any thought of buying back or repurchasing, or it may mean the payment of an obligation according to its terms, and implies that there is something to be regained or recovered back again rather than a sale, purchase, or exchange.

See 76 C. J. S., Redemption, p. 177, and authorities cited.

As recently as Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568, this court, citing authorities, reaffirmed that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

"A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded."

Therein this court also held: "Every contract is made with reference to, and subject to, existing laws, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.

"The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.

"The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract." See, also, State ex rel. Jehorek v. McKelvie, 111 Neb. 224, 196 N. N. W. 110.

In Mulhall v. State, 140 Neb. 341, 299 N. W. 481, this court concluded that the Board of Educational Lands and Funds has no power in conveying land by deed to add restrictions not contained in the original sales contract.

In Reavis v. State, 140 Neb. 442, 300 N. W. 344, this court held that: "Where the state had given a contract to sell school-land, and agreed to give a deed in fee simple when the contract was paid in full, the fact that after

said contract of sale was given the Constitution of Nebraska was amended, making it illegal to deed away mineral rights on school-land, would not prevent the state from conveying said land under the terms of the original contract."

Also, in State ex rel. Jehorek v. McKelvie, *supra,* this court held that: "The acceptance and recording by a vendee of a deed from the governor of the state of Nebraska, conveying a portion of the state's common-school lands, and containing mineral reservations, which reservations were unauthorized and invalid, will not estop such vendee from afterwards demanding a proper deed of conveyance without such invalid reservations." By analogy, of course, such a vendee would also have the right to have his title quieted against such reservation.

Hile v. Troupe, 77 Neb. 199, 109 N. W. 218, dealt with the right, after declared forfeiture, to redeem a duly executed lease of school lands under circumstances comparable with those at bar. In that opinion, this court said: "The statute in force at the time the lease in suit was executed enacted a procedure for the declaration of forfeitures in cases of delinquencies in payments of rents, but with the following proviso: 'Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs *at any time before such land is again sold or leased.*' Laws 1883, ch. 74, sec. 20. This proviso remained in force until 1903, when it was amended by substituting for the portion thereof printed in italics the words 'at any time before such land is advertised to be leased at public auction' (laws 1903, ch. 100, sec. 17), and the statute as theretofore existing was then repealed. But the matter with which the legislature was dealing was not the exercise of governmental functions merely, but one having reference to the rights and obligations of the state as a party to certain contracts, and it is a well-settled principle that a state is as powerless, under the

operation of section 10, article I of the constitution of the United States, to impair by law its own contractual obligations as it is to affect in like manner the contracts of natural persons. Davis v. Gray, 83 U. S. 203; Hall v. Wisconsin, 103 U. S. 5; People v. Stephens, 71 N. Y. 527. And it is a principle much older than the constitution of the United States 'that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embaces (sic) alike those which affect its validity, construction, discharge, and enforcement.' Von Hoffman v. City of Quincy, 71 U. S. 535, 550. This language is authoritative and binding, not only upon this court, but upon every branch and functionary of the state government. And it is said by the same high authority: 'Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, * * * impairs its obligations.' Green v. Biddle, 8 Wheat. (U. S.), *1, *84. It is clear therefore that the right of redemption created by the above quoted proviso in the statute in force when the lease in suit was made became incorporated with and a part of that instrument. The proviso had nothing to do, as the attorney general contends that it did, with mere procedure or with the remedy by which the state was and is entitled to declare and enforce a forfeiture and a resale or release of the land; but it is entirely distinct therefrom and expressly designed to preserve to the lessee the valuable right to atone for his delinquencies and to redeem his land from forfeiture at any time during the pendency of such proceedings and before their termination by an actual resale or release. That such a right is a contractual one, which is valuable and vested and protected by the above mentioned constitutional guaranty, the authorities leave

us no room to doubt. Bronson v. Kinzie, 1 How. (U. S.) *311; Howard v. Bugbee, 24 How. (U. S.) 461; Cargill v. Power, 1 Mich. 369; Moody v. Hoskins, 64 Miss. 468; Dorrington v. Myers, 11 Neb. 388; Von Hoffman v. City of Quincy, supra. The act of 1903 was therefore, in the respect mentioned, inoperative upon the lease in question." By analogy, such statement has like application to a contract to purchase school lands, which has been duly executed in conformity with a vested right or option contained in the lease at the time of its execution.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ESTATE OF EMMA NISSEN, DECEASED. MELVINA HILLIGAS, APPELLANT, V. FRANK M. FARR, ADMINISTRATOR OF THE ESTATE OF EMMA NISSEN, DECEASED, APPELLEE.
105 N. W. 2d 578

Filed October 28, 1960. No. 34799.

1. **Appeal and Error.** By the terms of Rule 7, paragraph e, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court, a bill of exceptions may be amended by written agreement attached to the bill at any time before the case is submitted to the Supreme Court.
2. ———. By the terms of the same rule proposed amendments not agreed to by all of the parties shall be heard and decided by the district court, after notice, and the order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court.
3. ———. An amendment to a bill of exceptions will not be considered by the Supreme Court which has not been presented in compliance with Rule 7, paragraph e, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court.
4. ———. In a case coming to the Supreme Court on appeal, error will not be presumed but it must affirmatively appear from the record.

5. ———. The rule that error will not be presumed but must appear from the record applies in the instance of an appeal from an order granting a new trial, or any other appealable order, where a ruling depends upon an examination of the evidence taken at the trial.
6. ———. The exaction of the rule that on appeal error will not be presumed but it must appear from the record is that the entire record of the evidence must be presented.
7. ———. In the absence of a proper bill of exceptions, all assignments of error which require for their determination a reference to such a bill must be overruled.

APPEAL from the district court for Hamilton County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

E. H. Powell, for appellant.

John E. Dougherty and *Charles L. Whitney,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

The estate of Emma Nissen, deceased, was probated in the county court of Hamilton County, Nebraska. A claim was filed against the estate by "Mr. and Mrs. Ralph Hilligas" for $1,791.50, "for services rendered by each (of) us for decedent, and other miscelaneous (sic) items, over the years, as per attached itemization marked 'Exhibit A.'" A trial was had in the county court which resulted in an adjudicated allowance in the amount of $145 only. Mrs. Hilligas, using her true name of Melvina Hilligas, appealed from the adjudication to the district court. Ralph Hilligas did not join in the appeal. On appeal Melvina Hilligas filed a petition in which she claimed a right of recovery in the amount of $1,407.50. Issues were joined in the district court between Melvina Hilligas and Frank M. Farr, administrator of the estate. A trial was had to a jury which resulted in a verdict and judgment in favor of Melvina Hilligas and against the administrator for $1,407.50.

A motion for new trial, or in the alternative for judgment notwithstanding the verdict, was duly filed. Judgment notwithstanding the verdict was denied but a new trial was ordered. Melvina Hilligas has appealed from the order sustaining the motion for new trial.

On the appeal here Melvina Hilligas is designated plaintiff and appellant. She will be referred to hereinafter as plaintiff. The administrator is designated defendant and appellee. He will be referred to as defendant.

As grounds for reversal the plaintiff sets forth two assignments of error. The first is: "The trial court erred in granting a defense motion for a new trial (T42)." The second is: "The court's ruling at 2:157 is correct, and the court erred in departing therefrom at E10:177,179 and in entering the order at T42."

It is of course true that the content of the motion for new trial must be ascertained. It is further true of course that if a ground or grounds related to competency, relevancy, or materiality of evidence received or the propriety of the rejection of evidence, such questions could not be passed upon in the absence of a record of the evidence unless for some reason the assignments of error may not as a matter of law be considered.

The motion for new trial in this case contains 47 specifications of grounds for new trial. A proper determination upon the subjects contained in no less than 27 of them cannot be made in the absence of opportunity to examine a record of the evidence relating to these subjects adduced at the tiral. There is before this court no such record.

There is a bill of exceptions, it is true, but it is only a partial one properly prepared and presented agreeable to Rule 7, paragraphs c and d, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court, which rule is authorized by section 25-1140, R. S. Supp., 1959. This was prepared and presented pursuant to order and request of the plaintiff.

There is another volume denominated "Partial Bill of Exceptions No. 2" but in the light of a proper interpretation of Rule 7 of the rules of the Supreme Court and particularly paragraph e thereof this may not be regarded as a part of the bill of exceptions or as a partial bill of exceptions. If it is capable of characterization it must be regarded as an attempted amendment.

Paragraph e of Rule 7 of the rules of the Supreme Court provides for amendment and prescribes the method of accomplishment. It provides that where amendment is not agreed to by the parties the question of whether or not there shall be amendment shall be heard and decided, on notice, by the district court. It is further required that the order of the district court as to amendment shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. There has been no compliance with these requirements.

This volume was prepared pursuant to praecipe filed with the clerk of the district court by the defendant and not the plaintiff. The plaintiff agrees with the conclusion arrived at herein and asserts that it is no part of the bill of exceptions and may not be considered by this court.

The only bill of exceptions here for consideration therefore is the one prepared and presented by express direction of the plaintiff and agreed to in writing by one of the attorneys for the defendant. That direction was that the court reporter prepare and file a bill of exceptions containing the evidence only of the plaintiff when she was on the stand together with the exhibits introduced.

This partial bill of exceptions does not contain any evidence essential as proof of the claim asserted by plaintiff. No evidence appears therein establishing or tending to establish a right of recovery in favor of the plaintiff. The plaintiff does not contend otherwise.

It becomes clear therefore that the evidence on which the order was made is not before this court.

The sole substantial theory on which the plaintiff contends that the court erred in granting a new trial is that after the motion for new trial was submitted the court took it under advisement and, while the court had it under advisement and before ruling thereon, wrote and mailed a letter to the attorneys for the parties advising them as to views with relation to a part thereof and of the intended ruling thereon. The letter does not purport to be a ruling. It appears as exhibit 10 in the partial bill of exceptions. It points out that an appearance will be made in court and an order there entered conforming to the view expressed in the letter. The letter was dated November 6, 1959.

An order was duly rendered in court on January 22, 1960. By the order the motion for new trial was sustained. The order contains no statement of ground for sustaining the motion.

The letter got into the record in the district court on December 11, 1959, after the letter was written, when there was "additional argument on the motion for new trial." This was 1 month and 11 days before the order granting a new trial was rendered. It was offered by the plaintiff and received without objection.

A comment of the court precedes the admission of the letter. It perhaps has no legal force and effect, but it makes it clear that the letter was never intended as an adjudication. It is in pertinent part as follows: "The letter is not a Memorandum Opinion. It's not my thought or was not my thought when I wrote the letter that I would say in the order granting a new trial that I was granting the new trial for any particular reason. I doubt very much if the letter is material for the purpose of your showing, however, I believe I will receive it."

If it were assumed, as it is not herein, that exhibit 10 had any right to judicial recognition it could not be

said that it had the effect of avoiding the necessity of presenting the record of the evidence taken at the trial for review by this court on appeal.

The subject contained in the letter which plaintiff presents here is certain of the testimony of the plaintiff admitted at the trial which the defendant contended was incompetent. In the light of the partial bill of exceptions it becomes apparent that the question of whether or not this evidence was competent could not be determined by this court in the absence of other evidence which has not been presented for review.

In the light of what has been ascertained from the record and pointed out herein, it becomes necessary to proceed to consider certain questions which are primary, basic, and fundamental in the disposition of this appellate proceeding which have not been presented by the briefs in this case.

The first proposition in this area is that on appeal error will not be presumed but it must affirmatively appear from the record. See, Singer Mfg. Co. v. Doggett, 16 Neb. 609, 21 N. W. 468; Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335; Clute v. Mach, 153 Neb. 772, 45 N. W. 2d 897; State ex rel. League of Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N. W. 2d 682; Combes v. Anderson, 164 Neb. 131, 81 N. W. 2d 899; Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789; Hert v. City Beverage Co., 167 Neb. 557, 94 N. W. 2d 27. This is the general rule.

There is nothing in the decisions of this court the effect of which is to say that this general rule does not apply where the appeal is from any order involving the necessity for an examination of the evidence. Explicitly, in a case where a motion for new trial is sustained and the determination of the propriety of the order depends upon the examination of evidence the rule does apply. See, Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695,

35 N. W. 2d 772; Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579; Hert v. City Beverage Co., *supra.*

The all-embracing rule in a case where there is an appeal from an order granting a new trial, where no reason has been given therefor, is that the appellant is required to bring the record to the Supreme Court together with his assignments of error and submit the record for critical examination with a contention that there was no prejudicial error. See, Greenberg v. Fireman's Fund Ins. Co., *supra;* Bryant v. Greene, *supra;* Hert v. City Beverage Co., *supra.*

The exaction of the law that the record of the evidence must be presented when questions of fact are to be determined on appeal means that the entire record of the evidence shall be presented.

In Hazelet v. Holt County, 51 Neb. 724, 71 N. W. 719, it was said: "In the absence of a proper bill of exceptions, all assignments of error which require for their determination a reference to such a bill must be overruled." See, also, In re Estate of Abts, 122 Neb. 714, 241 N. W. 270; Plantz v. Peony Park, 129 Neb. 338, 261 N. W. 826; Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312; National Fire Ins. Co. v. Evertson, 157 Neb. 540, 60 N. W. 2d 638; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396; Pauley v. Scheer, 168 Neb. 343, 95 N. W. 2d 672; Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627; Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N. W. 2d 246.

The conditions therefore which would prevent the necessity for a presentation of a record of the evidence would be where the motion was not dependent upon an examination of evidence, or a reason given by the court in the order sustaining the motion which would point to a valid conclusion that there was an absence of necessity for such an examination. Neither of the conditions appears in this case. As pointed out, a large number of the assignments of error in the motion for new trial are predicated upon matters the propriety of

which may be determined only upon what appears or does not appear in the evidence. Also no reason for the order sustaining the motion for new trial is stated therein.

In the light of these principles there is nothing before the Supreme Court upon which a conclusion may be reached that the district court erred in sustaining the motion for a new trial.

The order and judgment of the district court in sustaining the motion for new trial is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOSEPH D. LAW, APPELLANT, V. RAY L. GILMORE, APPELLEE.
105 N. W. 2d 595

Filed November 4, 1960. No. 34748.

1. **Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. ———: ———. Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.
3. **Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
4. **New Trial: Appeal and Error.** When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial.
5. **Trial: Appeal and Error.** A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Miles N. Lee and *Tedd C. Huston,* for appellant.

A. Paul Johnson, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an automobile accident case. Plaintiff sued for damages to his car. Defendant, denying liability, by cross-petition sued for damages to his car. The cause was tried to a jury. It was stipulated that the amount of the damage to plaintiff's car was $658.55, and the amount of damage to defendant's car was $507.76. The court submitted the issue of contributory and comparative negligence to the jury. The jury returned a verdict for the plaintiff for $458.55.

Judgment was rendered on the verdict. On defendant's motion for a new trial the judgment and verdict were set aside and a new trial was granted.

Plaintiff purportedly appeals under the rules stated in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, and followed as recently as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579, applicable where, as here, the trial court gave no reasons for granting the new trial.

We confess some difficulty in determining from the briefs the prejudicial error which defendant contends exists in the record which justifies the decision of the trial court. It appears to resolve itself into three propositions: (1) The evidence was insufficient to submit the issue of defendant's negligence to the jury; (2) the evidence was insufficient to submit the issue of comparative negligence to the jury; and (3) evidence as to insurance was erroneously given prejudicial to the defendant.

The accident happened on a late December afternoon at the intersection of a state highway and a township road. The township road ran north and south. The state highway joined in a curved roadway running from west to north. The actual impact of the cars happened on the state highway just west of the point of the crotch of the "Y" formed by the intersection of the two roads. Plaintiff was going northeast on the curve. Defendant was going southwest at the entry of the curve. The point of impact occurred on the right half of the road or in plaintiff's lane of travel.

The evidence is in marked conflict on many matters. There is evidence, however, that would support a jury's finding that plaintiff was proceeding northeast around the curve on the left side lane, and that when he saw the defendant approaching he pulled to the right and was in his own lane of travel when the defendant ran into him.

There is evidence that fixes the defendant's speed at 65 or 70 miles per hour before the accident and the plaintiff's speed as from 35 miles per hour to a stop and a backing up started when the cars collided. There is also evidence that the defendant's car was 200 feet north of the point of impact when the plaintiff's car was 50 or 60 feet from it, and that plaintiff's car came to rest with its left rear wheel in defendant's lane of travel, coupled with evidence that plaintiff's car was pushed back into that position by the force of the impact.

Plaintiff's position here is that he is entitled to have the judgment against defendant sustained and that the trial court erred in setting it aside and granting a new trial. Defendant's position is that the court properly set aside the judgment against him and in favor of plaintiff.

There is a rule applicable here that where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on

the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Greenberg v. Fireman's Fund Ins. Co., *supra,* last followed in Gleason v. Poore, 167 Neb. 312, 92 N. W. 2d 705.

Defendant's principal argument here seems to be that the jury by reducing the stipulated amount of plaintiff's damage by approximately one-third thereby found, as a matter of law, that the plaintiff's negligence was "more than slight."

The trial court submitted to the jury the "amount of his recovery" if either party was entitled to recover from the other.

The court also submitted the issue of negligence and contributory negligence to the jury, and "* * * if you find that the plaintiff, Joseph D. Law, was guilty of slight negligence, and that the negligence of the defendant, Ray A. Gilmore, in comparison therewith was gross, then plaintiff would still be entitled to recover as to the allegations of his Petition, but in that event it will be your duty to deduct from said stipulated amount of damages such proportion thereof as you find the contributory negligence chargeable to the plaintiff bears to the entire negligence as shown by the evidence, and return a verdict for the balance only." And, likewise, "* * * if you find that the Cross-Petitioner, Ray A. Gilmore, was guilty of slight negligence, and that the negligence of the plaintiff, Joseph D. Law, in comparison therewith was gross, then the Cross-Petitioner would still be entitled to recover upon the allegations of his Cross-Petition, but in that event it will be your duty to deduct from said stipulated amount of damages such proportion thereof as you find the contributory negligence chargeable to said Cross-Petitioner bears to the entire negligence as shown by the evidence, and return a verdict for the balance only."

The giving of these instructions was not assigned as

error in the motion for a new trial. Error as to them is not claimed here by either party.

A similar situation existed in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109, where we restated the rule that instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.

Clearly the instructions permitted the jury to do exactly what was done by it in this case.

Plaintiff in his direct examination testified that he thought the defendant telephoned the banker at Callaway about notifying the safety patrol; that the banker came and "the State Farm Insurance Agent" and "I could be wrong on that, about him being the State Farm agent * * *." This was a volunteer statement not in response to any question, no objection was made to it, nor was the trial court asked to instruct the jury about it or take other action. It is now assigned as error justifying the granting of the new trial.

Prejudice to defendant does not appear. The rule is that errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. Greenberg v. Fireman's Fund Ins. Co., *supra*, last followed in Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672.

Plaintiff here relies on the rule of practice promulgated in Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306.

The rule of practice adopted in the Fielding case does not hold that every reference to insurance in the trial of a cause is error, much less reversible error. See, also, Stephenson v. DeLuxe Parts Co., 133 Neb. 749, 277 N. W. 44; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1.

It is difficult to see error of the trial court when its attention was not called to the evidence now objected to, and where it was not asked to strike, admonish the jury, or otherwise rule in the matter.

Assuming error on the part of the trial court, the following rules are applicable here: When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

The other contentions of the parties have been reviewed. We find them to be without merit.

The judgment of the trial court is reversed and the cause remanded with directions to reinstate the judgment based on the jury's verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. JOHN A. KRIEGER ET AL., APPELLANTS, V. THE BOARD OF SUPERVISORS OF CLAY COUNTY, NEBRASKA, APPELLEE.

105 N. W. 2d 721

Filed November 4, 1960. No. 34816.

1. **Mandamus.** Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice.
2. ———. The proper practice in this state in a mandamus action is to issue the writ in the name of the state upon the relation of the party or parties claiming the relief sought.
3. ———. The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ

by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed.

4. ———. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause.
5. ———. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings are permitted.
6. ———. If no answer is filed to an alternative writ then a peremptory writ must be allowed.
7. ———. Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby.
8. ———. If no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered under section 25-2160, R. R. S. 1943, and notice given thereof.
9. ———. The ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus.
10. ———. A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce.
11. ———. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

APPEAL from the district court for Clay County: NORRIS CHADDERDON, JUDGE. *Affirmed.*

John F. McCarthy, for appellants.

J. T. Massie, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

On August 4, 1958, John A. Krieger and Mary Krieger brought a mandamus action in the district court for Clay County in the name of the State of Nebraska upon the relation of themselves as relators. The purpose of the action is to require respondent, the Board of Supervisors of Clay County, to obey and carry out a judgment rendered by the district court for Clay County on June 14, 1949, in an action wherein relators were plaintiffs. This action was properly brought for, as stated in City of Crawford v. Darrow, 87 Neb. 494, 127 N. W. 891: "* * * the practice in this state has been to issue it (writ of mandamus) in the name of the state upon the relation of the party claiming the relief sought, * * *." See, also, State ex rel. Levy v. Spicer, 36 Neb. 469, 54 N. W. 849.

On September 15, 1959, the trial court ordered a hearing to be had on November 2, 1959, at 10 a.m., on relators' petition for mandamus and also ordered that notice thereof should be given to the respondent at least 10 days prior thereto. Such notice was personally served on every member of the Board of Supervisors of Clay County on October 1, 1959. Thereafter, by an agreement of the parties, which was approved by the trial court, the hearing set for November 2, 1959, was continued to November 5, 1959. On November 5, 1959, the relators asked leave to amend their petition. They were given 10 days in which to do so. They filed their amendment on November 16, 1959. Respondent was given 20 days in which to file an answer to the relators' petition, as amended. On December 4, 1959, respondent filed a motion seeking to require the relators to make their petition, in certain respects, more definite and certain. Further hearing was had before the district court on December 8, 1959. At that time respondent's

motion was overruled and it was given 7 days in which to file an answer to the relators' petition for mandamus. Relators' counsel excepted to this ruling, contending that under sections 25-2163 and 25-2164, R. R. S. 1943, they were entitled to a peremptory writ of mandamus because respondent had failed to answer. The court refused to grant the writ requested. Thereafter, on December 15, 1959, respondent filed an answer in the form of a general denial. Trial was had on January 6, 1960. After relators had rested respondent moved for a dismissal on the ground that relators had failed to prove the allegations of their petition. This motion the trial court sustained and thereupon dismissed relators' petition. Relators filed a motion for new trial and this appeal is from the overruling thereof.

Relators contend that the trial court abused its discretion in not issuing a peremptory writ of mandamus when respondent failed to answer, as required by statute. The answer to this contention, in view of the proceedings had, requires us to review our holdings on procedure in mandamus actions.

The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. See § 25-2160, R. R. S. 1943. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. See §§ 25-2158 and 25-2159, R. R. S. 1943. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings are permitted. See §§ 25-2162 and 25-2164, R. R. S. 1943. If no answer is filed to an alternative writ then a peremptory writ must be allowed.

§ 25-2163, R. R. S. 1943. Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby. American Water-works Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N. W. 64; State ex rel. Gillilan v. Home Street Ry. Co., 43 Neb. 830, 62 N. W. 225. However, under our holdings, if no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered under section 25-2160, R. R. S. 1943, and notice thereof given. State ex rel. Gillilan v. Home Street Ry. Co., *supra;* City of Crawford v. Darrow, *supra;* State ex rel. Kelley v. Ferguson, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. N. S. 266; Kurth v. City of Lincoln, 162 Neb. 643, 76 N. W. 2d 924. As stated in State ex rel. Moore v. Chicago, St. P., M. & O. R. R., 19 Neb. 476, 27 N. W. 434: "Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. * * * Hence the ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus." See, also, § 25-2156, R. R. S. 1943.

In view of the foregoing we can see no abuse of discretion by the trial court when it heard the matter on its merits after it had been set down for hearing on relators' petition for a writ of mandamus and respondent had filed an answer raising issues of fact. The trial court could have properly issued an alternative writ of mandamus, and probably should have done so, but certainly not the peremptory writ of mandamus which relators demanded. However, we find no prejudicial

error, under the situation here disclosed, by reason of the trial court's failure to issue an alternative writ of mandamus. And, in this respect, we find no error in the trial court's extending the time in which respondents could file an answer. It was within the discretion of the trial court to do so and we find no abuse of such discretion. Relators' contentions in this respect are without merit.

On June 14, 1949, relators obtained the following judgment in the district court for Clay County against the Harvard township board of Clay County.

"IT IS THEREFORE ORDERED BY THE COURT that the defendant, (Harvard) Township Board, be and they are hereby directed to place a 48 inch half circle culvert in the Township road above described, which runs in an east-west direction on the north side of said Section 29, at a point approximately 160 feet west of the northwest corner of said NE¼ of said Section, and to fill the road ditches of said township road to the height of the surrounding land at a point approximately 150 feet East of said northwest corner of said NE¼ Section. *That upon said defendant complying with said order, said action shall stand dismissed with prejudice,* and the costs of this action are hereby assessed equally between plaintiffs, defendant, and intervenors." (Emphasis ours.)

The record discloses that shortly after this judgment was rendered the mandatory provisions thereof were fully complied with. Whether it was caused to be done by the Harvard township board or the Board of Supervisors of Clay County is not entirely clear although it was apparently caused to be done by the latter. John A. Krieger, one of the relators who owned the land involved in the original action, testified to the effect that dams or fills in the ditches on each side of the road were put in. John H. Schmer of Harvard, Nebraska, who was a member of the Board of Supervisors of Clay County in 1948, 1949, and 1950, testified to the effect

that he read the judgment rendered in favor of relators by the district court for Clay County on June 14, 1949, shortly after it was rendered and complied therewith by causing the culvert to be put in and caused dams or fills to be placed in the ditches on each side of the road, and that he put in the culvert and fills pursuant to and in accordance with the foregoing judgment.

The burden of proof was on relators to establish their right to mandamus. See 55 C. J. S., Mandamus, § 325b, p. 559.

"Mandamus is a civil remedy and is a legal as distinguished from an equitable proceeding, although issuance of the writ is largely controlled by equitable principles." State ex rel. School Dist. v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421.

"A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce." State ex rel. School Dist. v. Board of Equalization, *supra.* See, also, State ex rel. Schoonover v. Crabill, 136 Neb. 819, 287 N. W. 669; Hess v. Taylor, 142 Neb. 184, 5 N. W. 2d 346; State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

We have often stated: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." State ex rel. Long v. Barstler, 122 Neb. 167, 240 N. W. 273. See, also, State ex rel. Schoonover v. Crabill, *supra;* State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26; State ex rel. Bates v. Morgan, 154 Neb. 234, 47 N. W. 2d 512; Kurth v. City of Lincoln, *supra;* State ex rel. School Dist. v. Board of Equalization, *supra.*

When the provisions of the judgment rendered by the

district court for Clay County on June 14, 1949, had been fully complied with, as the record shows they were shortly after the judgment was rendered, the judgment, by its own terms, was no longer in force and effect for it had been satisfied. Therefore, the duty imposed by that judgment on the Harvard township board did not exist, as a matter of law, as against the Board of Supervisors of Clay County, at the time the writ of mandamus was applied for.

Sometime after June 14, 1949, Harold F. Smith and Forrest Pense made application for a change in procedure under the order of June 14, 1949, and on September 1, 1951, such change was authorized. On appeal to this court the order of September 1, 1951, was declared to be void and without force and effect because the judge who rendered it had neither jurisdiction nor power to do so. See Krieger v. Schroeder, 165 Neb. 657, 87 N. W. 2d 367. However, holding the order of September 1, 1951, to be without force and effect did not change the rights of the parties to the order of June 14, 1949, whatever they might be.

Sometime after June 14, 1949, the Board of Supervisors of Clay County took over the maintenance of the township road herein involved as part of a mail route. After they did so they graded it but apparently left the culvert intact and, after doing so, replaced the dams in the ditches on each side of the road. However, it appears that since that was done something has caused part of the dam in the north ditch to disappear. It is this dam or fill that the relators want replaced. If the relators are being irreparably damaged by reason of this condition injunctive relief is open to them or they may sue for damages or possibly both. That being true mandamus is not available to them. See § 25-2157, R. R. S. 1943.

What the Clay County Board of Supervisors should now do in regard to maintaining this road depends on the circumstances surrounding the situation at the pres-

ent time. In this respect we might mention that on August 9, 1956, the Board of Supervisors of Clay County was substituted as defendant for the Harvard township board in the original action, No. 7201, filed by the relators in the district court for Clay County and served with summons therein. However, the record does not show that any further action has been had therein as far as the Board of Supervisors of Clay County is concerned. We think the rights of the parties, as they now exist, can be determined in that action as a matter of fact and, by reason thereof, the trial court was correct in denying the relief they herein sought. Costs herein are taxed to the relators.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

FLORENCE L. HUNGERFORD, ADMINISTRATRIX OF THE ESTATE OF CLEO HUNGERFORD, DECEASED, APPELLANT, V. ROBERT A. KNUDSEN, APPELLEE.
105 N. W. 2d 568

Filed November 4, 1960. No. 34821.

1. Trial: Appeal and Error. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by this court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court.
2. ———: ———. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Leamer & Graham, for appellant.

Mark J. Ryan, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Cleo Hungerford commenced this action against the defendant to recover damages for injuries received while riding as a guest in an automobile owned and operated by the defendant. Issues were joined and a trial had. At the close of the plaintiff's evidence the trial court directed a verdict for the defendant. The plaintiff has appealed. The record shows that Cleo Hungerford died on October 11, 1959, and the action was revived in the name of Florence Hungerford, administratrix of the estate of Cleo Hungerford, deceased.

The plaintiff failed to file a motion for a new trial. It is the contention of the defendant that the filing of a motion for a new trial is essential to a review of the errors assigned on appeal in the instant case.

The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law. Larson v. Wegner, 120 Neb. 449, 233 N. W. 253; Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120.

The Legislature in 1947 amended the statute governing appeals to this court. Laws 1947, c. 85, § 1, p. 262. At the time the foregoing sections of the statute became effective it was a part of the procedure of this state that if a motion for a directed verdict was made during the trial of the cause, the ruling of the court thereon could not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial, and a ruling thereon secured in the trial court. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. Except to the extent that the procedure has been changed by the legislative act in 1947, the foregoing rule is in force in this state.

Section 25-1315.02, R. R. S. 1943, as amended by the 1947 act, provides that whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Thereafter, and within the statutory time therein stated, the party who has moved for the directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict. Section 25-1315.03, R. R. S. 1943, as amended by the 1947 act, provides that an order entering judgment, as provided by section 25-1315.02, R. R. S. 1943, or granting or denying a new trial, is an appealable order. In other words, a motion for a new trial is not always essential to review on appeal under the procedure specified by the 1947 amendment. This was determined in Krepcik v. Interstate Transit Lines, *supra,* and the reasons therefore are explicitly stated therein. We adhere to the reasoning of that case.

In the instant case the motion for a directed verdict was made at the close of plaintiff's case. Since the 1947 amendment applies only in cases where a motion for a directed verdict is made at the close of all the evidence and is denied or not granted for any reason, the 1947 amendment is not applicable to the situation before us. Consequently, the rule applicable where a motion for a directed verdict is made at the close of plaintiff's evidence is that the ruling of the trial court thereon can not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial and a ruling thereon secured in the trial court.

When it is sought to review the judgment of the district court in a law action, no required motion for a

new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. Shipley v. McNeel, 149 Neb. 790, 32 N. W. 2d 639; In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85. Since the answer of the defendant states a defense to the action, the judgment of the district court must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MOLLIE KRAMER, APPELLANT AND CROSS-APPELLEE, V. PETER KRAMER, JR., APPELLEE AND CROSS-APPELLANT.
105 N. W. 2d 741

Filed November 4, 1960. No. 34828.

1. Divorce. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband toward the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by this court on appeal.
2. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Scotts Bluff County: RICHARD N. VAN STEENBERG, JUDGE. *Affirmed.*

Lyman & Winner, for appellant.

Wright & Simmons, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff, Mollie Kramer, brought suit for divorce against the defendant, Peter Kramer, Jr., on the ground of cruelty. Defendant denied generally and cross-petitioned for a divorce on the ground of cruelty. The trial court granted a divorce to the plaintiff and awarded alimony to her. The plaintiff contends the alimony granted is inadequate under the evidence. The defendant asserts that the divorce should have been granted to him and that the amount of the alimony granted is excessive.

Plaintiff and defendant were married on February 1, 1927. Five children were born to the marriage, all of whom have reached their majority. The plaintiff was 52 and the defendant 59 years of age at the time this suit was commenced. There is evidence in the record, adequately corroborated, of cruelty on the part of the defendant toward the plaintiff. The decree of divorce is sustained by the evidence which we do not deem necessary to recite since the major issue raised by the appeal and cross-appeal is the correctness of the award of alimony.

The evidence shows that the parties worked hard for several years after their marriage and accumulated very little property until the early 1940's. The parties became the owners of three 80-acre tracts of land in Scotts Bluff County which are particularly described in the pleadings. The first 80-acre tract was acquired in 1948 at a cost of $22,000. It is referred to in the record as the Gering farm. Defendant gave its value as $35,000 to $38,000. A real estate agent fixed its value at $28,000. It is subject to a mortgage lien of $2,676.01.

The other two 80-acre tracts were purchased in 1953 and 1957 for $22,000 and $17,500 respectively, and were subject to mortgage liens in the amounts of $4,950 and $8,100. The defendant fixed the value of the two 80-acre tracts at $40,000. The real estate agent fixed their value at $46,000. These two 80-acre tracts adjoin and are referred to as the Scottsbluff farm. The value of the trucks, tractors, and farm machinery was appraised at $10,057, including a 1955 Buick automobile valued at $700. The value of feed on hand was appraised at $453.44. The value of cattle on feed was appraised at $13,935. The value of crops raised and not sold was fixed at $2,505, exclusive of the bean crop. Household goods were estimated to have a $300 to $500 value. There is evidence that the parties had commercial fertilizer valued at $979.40. They also possessed checks worth $88.34, $1,359.68, $358.34, and two for $82 each. They also had two tractor tires and a tube valued at $264 and 9 shares of co-op stock the value of which was not shown. The defendant testified that he had an indebtedness of $5,000 to a local bank, $750 to an implement company, and $935.85 for income taxes due and unpaid. From this it is evident that the value of all the property of the parties varied from $86,500 to $92,500, approximately, depending on the evidence accepted as credible.

It is the contention of the plaintiff that she is entitled to receive 50 per cent of all the property as alimony since it was all accumulated by the joint efforts of the parties and the title to the real estate was held by them in joint tenancy.

The trial court awarded the 80-acre Gering farm to the plaintiff subject to the mortgage lien thereon, and the Scottsbluff farm to the defendant subject to the mortgage liens thereon. The plaintiff was awarded the household furniture, the family car, and $10,000 payable $1,000 forthwith and $1,500 annually until paid. The costs were taxed to the defendant, including an

attorney's fee of $1,000. All other property was awarded the defendant subject to any indebtedness against it. The value of the property awarded the plaintiff is $36,-323.99. In arriving at this figure the household goods are valued at the $300 minimum testified to, and the Gering farm is valued at $28,000 rather than the $35,000 to $38,000 value testified to by the defendant. The $1,000 allowed as an attorney's fee is not included in the value of plaintiff's award.

The rule applicable in fixing the amount of alimony to be allowed in cases of this kind is stated in Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294, as follows: "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

We point out that this rule provides no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case. In the instant case the defendant was given more than one-half of the property but he is charged with the payment of most of the indebtedness and with the payment of $10,000 to the

plaintiff. On the other hand, the property awarded the plaintiff is free from indebtedness except the mortgage lien on the Gering farm in the amount of $2,676.01. Defendant is also charged with the payment of the costs, including attorney's fee of $1,000. We are of the opinion that the decree of the trial court entered on February 25, 1960, is fair and equitable under the evidence in the record before us.

The decree as entered on February 25, 1960, is affirmed. This means that plaintiff is entitled to the income from the Gering farm after that date. On the other hand, the amount of temporary alimony payments made after such date shall be credited as payments on the $10,000 award to the plaintiff.

AFFIRMED.

ARTHUR C. LAUGHREY, APPELLEE, V. VIOLA H. LAUGHREY, APPELLANT.
105 N. W. 2d 576

Filed November 4, 1960. No. 34841.

1. Divorce. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required.
2. ———. The corroboration relied upon in a suit for a divorce must in itself be competent evidence of the acts and conduct asserted as a ground for divorce.

APPEAL from the district court for Madison County: LYLE E, JACKSON, JUDGE. *Reversed and remanded with directions.*

Bernard Ptak, for appellant.

Hutton & Hutton, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff, Arthur C. Laughrey, brought suit for divorce against the defendant, Viola H. Laughrey, on the ground of cruelty. Defendant denied the allegations of the petition and cross-petitioned for a divorce from bed and board. The trial court granted a divorce to the plaintiff and dismissed defendant's cross-petition. The defendant has appealed.

Plaintiff and defendant were married on July 13, 1956. At the time of the trial on March 4, 1960, plaintiff was 74 and defendant 71 years of age. Plaintiff testified that the marital difficulties of the parties commenced about a year after the marriage. He stated that the defendant refused to prepare meals and that he had to prepare his own. He stated that she insisted on keeping the temperature of the home at 70 degrees and this was too cold for him. He stated that because of the chilliness of the home when she was present, he lived in the utility room which was much warmer. Plaintiff stated also that defendant kept the volume on the television set so high it interfered with his sleep. He stated that this caused him great mental anguish amounting to extreme cruelty toward him.

The only evidence of corroboration was provided by Gilbert Lieswald. He testified that he had known the plaintiff about 8 years and had visited at plaintiff's home on four occasions. On three of the occasions defendant was not home and he found the home to be warm and comfortable. On the occasion when defendant was home he testified that the house was "kind of chilly" and that plaintiff was reading a paper in the utility room where it was warm and comfortable. This is all of the corroborative evidence that appears in the record.

A decree of divorce may not be granted in this state solely on the declarations, confessions, or admissions of the parties, and in all cases other satisfactory evidence of the facts alleged in the petition is required. § 42-335,

R. R. S. 1943. The corroboration must in itself be competent evidence of the acts and conduct asserted as a ground for divorce. Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315. The corroborative evidence in the instant case does not support the allegations of cruelty. There is no evidence that the chilly house on the one occasion testified to caused plaintiff any anguish or concern whatever. It is not corroborative of the charge of cruelty.

It is evident that the parties did not get along well after the first year of their marriage. But mere incompatibility, standing alone, is not a ground for divorce in this state. Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321. Extreme cruelty consists of acts or omissions of such a character as to destroy the peace of mind or impair the bodily health of the injured party, or to be such as to destroy the ends and objects of matrimony. Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126. There is no corroborative evidence to sustain such a conclusion in this case. The following language from Brown v. Brown, 130 Neb. 487, 265 N. W. 556, is particularly applicable: "It is not for this court to attempt to do what is best for the parties. The relief which should be granted is that provided by the statute upon the establishment of misconduct on the part of the defendant amounting to extreme cruelty. A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief. While it is apparent that the results of this marriage have at times been most unhappy, that is no sufficient cause named in the statutes for granting a decree of divorce."

The evidence is insufficient to sustain the granting of a divorce to the plaintiff. The decree of the district court is reversed and the cause is remanded with directions to the district court to dismiss the case and to tax the costs in that court to the plaintiff, including

the allowance of attorney's fees there made. The costs of this appeal are taxed to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

JAMES KNAGGS, APPELLEE, V. CITY OF LEXINGTON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
105 N. W. 2d 727

Filed November 4, 1960. No. 34859.

1. **Workmen's Compensation: Appeal and Error.** On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us.
2. ———: ———. However, where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others.
3. **Workmen's Compensation.** A claimant must prove, in order to recover under the Nebraska Workmen's Compensation Act, that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death.
4. ———. In other words, there must be a causal connection between an accident suffered by the claimant and the cause of his disability.
5. ———. In the determination of the question of causation, the disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated so as to produce such final result as where the same result follows directly from visible violence done to the physical structure of the body.
6. ———. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the workmen's compensation act.
7. ———. Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the meaning of the workmen's compensation act.

8. ———. An accident, within the meaning of the statute, shall be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury.
9. ———. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute.
10. ———. Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act.
11. ———. In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking.
12. ———. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Affirmed.*

Stewart & Stewart, for appellant.

Smith Brothers, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Dawson County. It involves a claim arising under the Nebraska Workmen's Compensation Act which was originally filed by James Knaggs in the Nebraska Workmen's Com-

pensation Court. The district court, on appeal by the City of Lexington, found that James Knaggs, claimant, was totally and permanently disabled by reason of a heart attack caused by an accident arising out of and in the course of his employment with the City of Lexington and, because thereof, ordered the city to pay claimant the sum of $33.84 per week for 300 weeks and thereafter the sum of $22.84 per week for the remainder of his life. It also ordered the city to pay certain medical, hospital, drug, and nursing bills, together with other expenses had by claimant in connection with his condition following the accident, all of which amounted to the sum of $1,967.02.

The City of Lexington filed a motion for new trial. This motion the trial court overruled except as to the items of hospital and medical expenses. As to these it granted a new trial for the purpose of redetermining the amount thereof. From this order the city took an appeal to this court. On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470. However, "* * * where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others." Dietz v. State, 157 Neb. 324, 59 N. W. 2d 587.

Appellant states the question involved in this appeal as: "Did the appellee suffer an injury to his person which was the proximate result of an accident within the meaning of the Nebraska Workmen's Compensation Act?" In this respect appellee has the burden of proof. See, Anderson v. Cowger, *supra;* Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394. He must prove, in order to recover, "* * * that an acci-

dent occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death." Anderson v. Cowger, *supra.* See, also, Jones v. Yankee Hill Brick Manuf. Co., *supra;* Gotfrey v. Sakurada, *supra.* And, as we have often said in this respect, a compensation award cannot be based on possibilities or probabilities. See, Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Chiles v. Cudahy Packing Co., *supra;* Anderson v. Cowger, *supra;* Gotfrey v. Sakurada, *supra.*

There must be a causal connection between an accident suffered by the claimant and the cause of his disability. Anderson v. Cowger, *supra;* Pixa v. Grainger Bros. Co., *supra;* McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30. In Schirmer v. Cedar County Farmers Telephone Co., 139 Neb. 182, 296 N. W. 875, we discussed the latter, as it relates to the situation here presented, in the following language: " 'In the determination of the question of causation, the disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated so as to produce such final result as where the same result follows directly from visible violence done to the physical structure of the body.' 71 C. J. 605. 'The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of workmen's compensation acts.' 71 C. J. 608. 'Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the meaning of workmen's compensation acts.' 71 C. J. 610. 'The acceleration or aggravation of an employee's heart condition thereby causing death or other disability may constitute physical harm of such a character as to come within the mean-

ing of workmen's compensation acts.' 71 C. J. 611."

"An accident, within the meaning of the statute, shall be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury. § 48-151, R. R. S. 1943; Ruderman v. Foreman Bros., *supra* (157 Neb. 605, 60 N. W. 2d 658); Muff v. Brainard, 150 Neb. 650, 35 N. W. 2d 597. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute. Beam v. Goodyear Tire & Rubber Co., *supra* (152 Neb. 663, 42 N. W. 2d 293); Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492." Anderson v. Cowger, *supra.* See, also, Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31; Jones v. Yankee Hill Brick Manuf. Co., *supra;* Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522.

"Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act." Gilkeson v. Northern Gas Engineering Co., 127 Neb. 124, 254 N. W. 714. See, also, Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574; Brown v. City of Omaha, 141 Neb. 587, 4 N. W. 2d 564, Anderson v. Cowger, *supra;* Jones v. Yankee Hill Brick Manuf. Co. *supra;* Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379; Eschenbrenner v. Employers Mutual Casualty Co., 165 Neb. 32, 84 N. W. 2d 169.

"In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim

by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking." Anderson v. Cowger, *supra.* See, also, Gotfrey v. Sakurada, *supra;* Chiles v. Cudahy Packing Co., *supra;* Hamilton v. Heubner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1.

"For workmen's compensation purposes 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Anderson v. Cowger, *supra.*

In the light of these principles we set forth the facts adduced. There is little dispute in the evidence except that of the doctors as their testimony relates to the cause of appellee's acute coronary occlusion, which condition resulted in his being totally and permanently disabled insofar as his ability to perform hard manual labor is concerned.

Appellee was employed by appellant in 1951 to work in its community hospital, known as Lexington Community Hospital, as a general custodial and utility employee. His duties consisted of maintaining the entire hospital property, both inside and outside. His work included the care of the oxygen equipment in the hospital, which required him to move oxygen tanks weighing from 300 to 400 pounds; the lifting of patients in and out of bed; the taking of supplies to every floor of the hospital; the care of the boiler room; the painting and carpenter work; the scooping of snow; the mowing of the lawn; the trimming of trees; and the doing of everything that would come up in the hospital involving hard or heavy manual labor. He worked at his job 6 days a week, sometimes on Sundays, and occasionally at night.

On Saturday, February 1, 1958, appellee went to work at 8 a.m. He was then about 49½ to 50 years of

age, 5 feet 8 inches in height, weighed about 170 pounds and in apparent good health. He testified he was feeling real good when he went to work. He performed the usual routine duties of his job that morning when, about 10:30 while he was in the dining room on a coffee break, he was called by Mrs. Olmsted, a cook in the hospital, to fix a clogged disposal unit. Fixing a clogged disposal unit was one of the duties of his job as this condition apparently occurred quite frequently. Appellee got a large plunger for the purpose of fixing the clogged disposal unit. He then stepped on a chair and up onto the apron of the sink in which the disposal unit was located. Appellee placed his feet on the metal edge of the sink and began using the plunger while another employee of the hospital sought to flush it with water by means of an automatic flusher. After plunging it a few times appellee's feet slipped out from under him when, as he pushed the plunger down, it threw him and he fell backwards. When he fell either the lower part of his back or his buttocks hit the metal portion of the edge of the sink very hard. After falling appellee sat on the edge of the sink a short time, putting his feet on the chair which he had used to get up onto the sink. He testified the fall resulted in his having a peculiar, shook-up, trembling feeling; and that he didn't feel right. After sitting for a short time appellee got back up on the sink and finished the job, advising Mrs. Olmsted of that fact after he had done so. The job of fixing the clogged disposal unit took some 5 or 6 minutes.

Appellee then went into the laundry room, which is next to the room in which the disposal unit was located, to paint a strip of floor some 4 feet wide along the east side thereof. Located in this area, and against the east wall were two electrical units, one a refrigerator and the other a deep freeze. Appellee had previously moved the refrigerator, which weighed some 500 pounds, but had never had occasion to move the deep freeze which

had been installed in the laundry room some 2 or 3 months before the accident. The deep freeze was about 12 to 15 feet long, 3 to 4 feet deep, and 3½ to 4 feet high. It weighed about 1,500 pounds and, when placed in the laundry room, it was placed there by 3 men who used rollers for the purpose of moving it into the laundry room of the hospital from a truck that brought it to the hospital. Appellee had to move these two pieces out from the east wall of the laundry room some 4 feet in order to paint the floor along the east wall thereof. He had, the day before, moved the deep freeze out from the wall with a claw bar far enough so he could get behind it.

After appellee put away the plunger, the laundry room being used by him as his workshop, he proceeded to move the deep freeze, which was full of groceries. He did so by pushing it with his feet, getting behind it with his back to the wall. He pushed it out by pushing it first at one end and then at the other until finally he got it out from the wall the desired distance of about 4 feet. Appellee testified it took every bit of effort he could give to move the deep freeze and that he pushed it as hard as he could. Appellee then moved the refrigerator, which was full of groceries, out far enough to paint a 4-foot strip. He did so by pushing and pulling it. Moving the deep freeze and refrigerator took about 20 to 25 minutes. During all of the time appellee was doing this work he continued to have this peculiar, shook-up, trembling feeling that came over him after the fall he had taken while fixing the clogged disposal unit.

After he moved out the two pieces of equipment appellee got a pan of paint and a roller and started to paint a 4-foot strip along the east side of the laundry room. As he started using the roller for this purpose the pain he had got worse. He hurried with the painting to get through but the pain kept increasing. Finally, after 20 to 25 minutes, he finished the painting job but

he was not able to put away the tools he was using. He just put them to one side. When he finished the painting, pain was all over his body and he had a trembling feeling. He walked down to the laboratory in the hospital, which was on the same floor but some 200 feet from the laundry room. The pain kept getting worse and he couldn't sit down. A doctor was called. The doctor put him in a wheel chair and took him to a room where he was given a shot.

Appellee described his condition, before he was given the shot, as though he was going to pieces from the pain which was all over his body. Witnesses, who saw him in the wheel chair, testified appellee looked pale and appeared in extreme and acute pain; and that he had his hands clenched and was moaning and groaning. Appellee was kept in the hospital because of this condition until March 30, 1958, and there is no question but that, in view of our holding as hereinbefore set forth, he is now totally and permanently disabled because thereof. Appellee was only trained for and had always engaged in the performance of hard and heavy manual labor as a means of earning a livelihood. The evidence adduced shows, because of his present physical condition due to the coronary occlusion he suffered, that he can no longer engage in the performance thereof.

Appellee testified he had no knowledge of ever having experienced a heart attack prior to February 1, 1958, nor had he ever suffered any arm or chest pains. Dr. E. A. Watson of Lexington, who testified appellee was a patient of his, said he never observed appellee having any symptoms of heart disease nor had he ever made any complaints to him which could relate thereto, such as pain in the arms, shoulders, chest, or being short of breath.

Dr. E. A. Watson attended appellee during the course of his illness resulting from the acute coronary infarct or occlusion he suffered on February 1, 1958. He testified on direct examination that: "I think that the

trauma associated with the fall, the temporary shock pattern which developed following the fall, the extreme exertion or moving the heavy equipment shortly thereafter at the hospital, all played a very prominent picture in causing the picture of coronary thrombosis or coronary infarct to develop at that time." He was then asked on cross-examination: "Now Doctor, I think your testimony has been that you believe his heart attack came on as a result of the combination of this trauma to his buttocks and the extreme exertion on moving the equipment - - is that your conclusion?" To this question he responded: "It is." He was further asked on cross-examination: "And so when you say that in your opinion, the combination of the falling on the buttocks and the extreme exertion, that's your opinion, that's your guess at it, isn't it, Doctor? You can't say definitely, unless there was an operation or unless you could examine the organs?" To this he responded: "If the combination, as you have described it, hadn't happened, Mr. Knaggs wouldn't have had a coronary on the 1st of February, 1958." He then was asked on redirect: "And as I understand your testimony, why, you are of the opinion that this man's heart attack arose from a combination of the physical and emotional shock and the fall and the heavy exertion, is that correct?" To this he responded: "That's correct."

Dr. Arthur M. Greene of Omaha, who specializes in internal medicine, examined appellee at his office in Omaha on August 4, 1959. He took a complete history of the appellee at that time, made a physical examination, took an electrocardiogram and chest X-rays, and did certain laboratory work. The laboratory work consisted of determining the sedimentation rate, infarction volume, hemoglobin, white blood count, differential blood count, and urinalysis. From these he found evidence of heart disease but no evidence of infections or other diseases leading to heart disease, that is, his

examination revealed an acute, severe antero-septal myocardial infarction. Dr. Greene stated: "The cause of the hardening of the arteries is arteriosclerosis; the heart attack occurs when the vessel is suddenly blocked, either by hemorrhage into an arteriosclerotic plaque or by a sudden blood clot into in (an) artery or by rupture of an artery in the coronary system of the heart." Dr. Greene discussed the causes leading up to appellee's condition and thereafter went on to state that: "My opinion is that this gentleman, although previously having had coronary sclerosis, suffered an acute heart attack because of unusual stress and strain of the morning's activities." On cross-examination he was asked: "Doctor, you talked about the unusual stress and strain from his morning's activities. Which particular activties were you thinking of?" To this question he responded: "I was thinking mainly of a sudden fall and a jolt, landing on his buttocks, and then using all of his strength to move a heavy refrigerator (deep freeze)."

It is true that three other well-qualified doctors were of the opposite opinion. In this situation we consider as applicable the rule hereinbefore stated when evidence is conflicting and cannot be reconciled. In this respect we mention the circumstance of appellee moving the fully-loaded deep freeze as not being exertion of a character as would ordinarily be incident to his employment. The evidence shows it required extreme overexertion. We have come to the conclusion, as did the district court, that appellee suffered a compensable injury due to an accident arising out of and in the course of his employment. Admittedly appellee was, on February 1, 1958, drawing wages of $50.77 per week and there is no question raised about the weekly payments allowed appellee being correct in view thereof.

Appellant and appellee have both cited Nebraska cases contending they exemplify factual situations comparable to the one before us and that the holdings therein should, in effect, be controlling here. Each case arising

under the Nebraska Workmen's Compensation Act must stand on its own facts and the laws of this state relating thereto, together with our opinions construing such laws. And, as to the cases cited from other jurisdictions, we said in Eschenbrenner v. Employers Mutual Casualty Co., *supra:* "In referring to the decisions of other jurisdictions it must be borne in mind that the compensation laws of the various states differ widely in many essential respects." And, we might add, the opinions of various states also differ widely in construing identical provisions.

The trial court, as hereinbefore stated, granted appellant a new trial for determining the proper amount to be allowed for medical and hospital expenses incurred because of the injury suffered by appellee. It appears that although appellee was hospitalized from February 1 to March 30, 1958, because of the acute coronary occlusion which he suffered on February 1, 1958, he was also treated for duodenal ulcers and probably gall bladder condition while confined therein. In fact, appellee consented to remit $60 from the amount allowed for medical and hospital services, together with half of the total of $54 allowed as expenses for two trips to Omaha, because they related to his being treated for these diseases. The record fully supports the trial court's order in this respect and is affirmed. Costs of this appeal are taxed to appellant.

In view of what we have said the judgment of the trial court is in all respects affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

CARTER, J., dissenting.

I cannot agree that causal connection between the accident and the coronary occlusion was established. Three physicians called by the defendant testified to a complete absence of causal connection. They testified that a coronary occlusion is a result of arterial disease of long duration. At a certain stage of its progress a coronary

occlusion is inevitable and is unaffected by trauma unless the injury is directly in the area of the diseased portion of the anatomy. The decision in this case, however, rests on the evidence of two doctors called by the plaintiff.

Dr. Arthur M. Greene testified that a coronary occlusion could result from an injury to the area of the heart or from extreme exertion. It was his opinion that the plaintiff in falling on his buttocks and the exertion of pushing the deep freeze provided a pattern that precipitated the coronary attack. He knew of no instance where such a fall precipitated a coronary attack. He could not say when the heart attack occurred nor could he point to any event of the morning that caused plaintiff's attack. He stated that it was conceivable that a coronary attack might result from the jar of the fall but that he did not know if it could. On this point he admitted that he was in the realm of possibility only.

Dr. E. A. Watson testified that he could not say that any one thing caused the coronary attack and that it was the exertion resulting from everything that happened that induced the attack. He stated that the only sure way of determining the cause of a coronary attack was by autopsy after death. In discussing the relation of overexertion to the coronary attack he said that it was theorizing on his part but that he felt that the whole sequence of events was a pattern and if the pattern hadn't occurred, plaintiff would not have suffered a coronary attack on the day he did. He testified that he could point to no single event that induced the coronary attack.

There is no evidence in this record that the fall on the buttocks alone produced, activated, or accelerated the coronary attack. There is evidence in the record that it did not and could not have produced, activated, or accelerated the attack. In my opinion the evidence is clearly insufficient to establish by a preponderance of the evidence that the fall caused, activated, or accel-

erated the coronary attack. I submit that it takes more than proximity in time to establish causal connection between an accident such as we have here and a coronary attack.

This court on several occasions has held that the burden of establishing that an accident contributed directly to the death of an employee or to the activation or acceleration of a disease is not met by mere guess, surmise, conjecture, speculation, or possibility. Nelson v. Frenchman-Cambridge Irr. Dist., 168 Neb. 37, 95 N. W. 2d 201; Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574.

CLARENCE R. OTTEMAN, APPELLEE, V. THE INTERSTATE FIRE AND CASUALTY COMPANY, INC., A CORPORATION, APPELLANT.
105 N. W. 2d 583

Filed November 4, 1960. No. 34925.

1. **Trial.** A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment.
2. **Trial: Appeal and Error.** An exception to the general rule that only final orders are appealable appears in section 25-1315.03, R. R. S. 1943, wherein it is provided that an order entering judgment as provided in section 25-1315.02, R. R. S. 1943, or granting or denying a new trial, is an appealable order.
3. **Judgments.** The summary judgment process as defined by statute is a special proceeding.
4. **Trial.** An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory.
5. ———. An order sustaining a motion for new trial is in its essence interlocutory.
6. **Trial: Appeal and Error.** The interlocutory character of an order sustaining a motion for new trial is not destroyed by the fact that by the terms of section 25-1315.03, R. R. S. 1943, an appeal may be taken therefrom.

7. **Trial.** A trial is the examination before a competent tribunal, according to law, of facts or law put in issue in a cause, for the purpose of determining such issue.
8. **Trial: Judgments.** The process prescribed by the summary judgment act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial.
9. **New Trial.** A new trial does not involve an original examination of issues, but only re-examination.
10. **Courts: Judgments.** A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *On motion of appellee to dismiss appeal. Motion to dismiss appeal sustained.*

William G. Line, for appellant.

Spear, Lamme & Simmons, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law wherein Clarence R. Otteman is plaintiff and appellee and The Interstate Fire and Casualty Company, Inc., a corporation, is defendant and appellant. The action was commenced in the district court for Dodge County, Nebraska. In the action a petition was filed and in due course an answer was filed as was also a reply. For reasons which will become apparent necessity does not arise to set forth the character of the pleaded cause of action or the defense thereto.

After the issues were made up each party submitted to the other interrogatories. Answers were in due course made. Thereafter the defendant made request for admissions. There was a due response by the plaintiff to this request.

Following these steps the defendant filed a motion for a summary judgment. The motion for summary

judgment was sustained on July 7, 1960, and by judgment of the district court the petition of plaintiff was dismissed.

On July 14, 1960, the plaintiff filed a motion denominated motion for new trial. This motion was sustained on September 10, 1960. From the order sustaining the motion the defendant appealed. The plaintiff filed in this court a motion to dismiss the appeal. The ground of the motion is that the order vacating the summary judgment and granting a trial is not an order or judgment from which an appeal may be taken. This is the only question before this court at this time.

The motion to dismiss the appeal has been presented on memorandum briefs. From these briefs it appears, although there is nothing therein directly so stating, that the rendition of the summary judgment and the vacation thereof occurred within the same term of court. For the purposes of this opinion it will be assumed that this was true.

In the light of this assumption it becomes necessary to determine first whether or not the order vacating the judgment was a final order within the meaning of section 25-1902, R. R. S. 1943. If it was not then necessity will arise to determine whether or not it was appealable under section 25-1315.03, R. R. S. 1943.

A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment.

Section 25-1315.03, R. R. S. 1943, contains an exception to the general rule applicable under section 25-1902, R. R. S. 1943, that appeals may be taken only from final orders. This section provides in part the following: "An order entering judgment, as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order." For the purposes of this case

the concern is with the question of the right to appeal from an order granting a new trial.

If this was a final order within the meaning of section 25-1902, R. R. S. 1943, it follows of course that the order was appealable.

It is clear that the order was not one made on a summary application after judgment. It is also clear that it did not directly or in effect determine the action and prevent a judgment. It affirmatively left the action open for trial and judgment.

There can be little doubt that the summary judgment process as defined by statute is a special proceeding. That was so pointed out in Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543. In that case it was said: "A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective."

The process involved avoids the weighing of evidence and requires the determination to be based upon the sole question of whether or not there is any genuine issue of fact. Section 25-1332, R. R. S. 1943, defines it as follows: "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Based on reason however it may not well be said that what was done here affected a substantial right. What was done here preserved the right to a trial under orderly legal processes, a right which had been denied by the summary judgment. No substantial right basic in the subject matter of the action as presented by the pleadings was in anywise affected by the vacation of the summary judgment.

This court has held that an order is final only when

no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Merle & Heaney Mfg. Co. v. Wallace, 48 Neb. 886, 67 N. W. 883; Continental Trust Co. v. Peterson, 76 Neb. 411, 107 N. W. 786, on rehearing, 76 Neb. 417, 110 N. W. 316; Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N. W. 736; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497; Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385.

From an examination of section 25-1902, R. R. S. 1943, and these cases the conclusion is inescapable that by the section the previously declared interlocutory character of an order sustaining a motion for new trial has not been disturbed. It has remained the same.

The order of concern here was interlocutory and not final and was not appealable under the procedure applicable under section 25-1902, R. R. S. 1943.

At the 1955 session the Legislature enacted what is now section 25-1315.03, R. R. S. 1943. It was amendatory of a provision enacted in 1947. For present purposes it may be said that the portion of the provision of concern here actually came into being in 1947 and has since that time been in force and effect. This provision was in nowise declaratory of an intent to change the character of an order sustaining a motion for new trial as defined by this court from an interlocutory to a final order, although it did make such an order appealable. Such an order retained its character as an interlocutory order. All that the statute did was to grant the right of appeal from such an interlocutory order.

It follows that unless the proceedings which lead to a summary judgment and the rendition of such a judgment must be regarded as a trial the order vacating

the judgment and in terms granting a new trial did not afford a right of appeal.

A trial, as generally defined, is: "The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue." Black's Law Dictionary (3d Ed.), p. 1754. See, also, Marsch v. Southern New England R. R. Corp., 235 Mass. 304, 126 N. E. 519.

This court has not said in specific terms that the summary judgment does not amount to a trial. It has declared however that it does not amount to a formal trial. In Healy v. Metropolitan Utilities Dist., *supra*, the court in addressing itself to this subject said: "But the purpose of the rule does not include the depriving of a litigant of a formal trial where there is a genuine issue of fact to be determined."

Section 25-1333, R. R. S. 1943, contains language from which it appears that the Legislature in the enactment of the summary judgment act attempted to and at least inferentially did distinguish the summary judgment process from a trial. This section is as follows:

"If on motion under sections 25-1330 to 25-1336 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

It is observable that the section twice by inference

indicates that the portion of the action which may be disposed of by summary action is not done so by a trial and twice declares specifically that the portion which may not be so disposed of must be submitted at a trial.

In the light of this the conclusion reached is that an exercise of the process prescribed by the summary judgment act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial.

A new trial does not involve an original examination of issues of fact, but only re-examination. This is declared by section 25-1142, R. R. S. 1943, in the following language: "A 'new trial' is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. * * *"

There having never been a trial an order vacating a judgment and allowing for the first time a trial on the issues in the action cannot be regarded as the granting of a new trial.

Up to this point the rights of the parties have been considered on the basis of whether or not the order in question was one granting a new trial. It all related to the language of the motion and of the order employing that terminology. As was said there was not in that sense an order granting a new trial. There is however another basis on which it must be said the order was not appealable.

The plaintiff substantially contends that although the motion was denominated "MOTION FOR NEW TRIAL" it was by its declaration one requesting the court to, within the term, vacate the summary judgment. The motion is by its primary terms for an order vacating the judgment. The order primarily vacates the judgment. The order was rendered within the term.

The court had inherent power to vacate its judgment within the term. In County of Scotts Bluff v. Bristol, 159 Neb. 634, 68 N. W. 2d 197, it was said: "A court of

general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made." The defendant does not dispute this. In truth, this case is cited and the principle stated with approval by the defendant in its memorandum briefs. The fact that a misnomer may have been applied to certain relief which was granted to plaintiff if, as was true here, the relief sought and granted was sufficiently described and defined in the motion and the order granting the relief could be of no controlling consequence. Mere nomenclature or semantics will not be allowed to supersede a clear and substantial declaration of intent and purpose. Attention has not been called to any statute or any decisions which would permit an appeal from an order entered pursuant to this rule, except in the instance of an order granting in a true sense a new trial, or an order upon a motion to set aside a judgment notwithstanding the verdict, the effect of which would be to grant a new trial. As pointed out in this instance a new trial was not granted.

The order vacating and setting aside the summary judgment in favor of the defendant and against the plaintiff was not an appealable order and in this light the motion to dismiss the appeal of the defendant from that order should be and is sustained.

MOTION TO DISMISS APPEAL SUSTAINED.

GEORGE WILLIAM BLACKSTONE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
105 N. W. 2d 744

Filed November 10, 1960. No. 34779.

Assault and Battery. In a prosecution for assault which involves specific intent, the intent must be proved as charged.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed.*

Thomas P. Lott, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is a criminal action which was prosecuted in the name of the State of Nebraska by the county attorney of Douglas County against George William Blackstone who was charged by information with the offense of assault with intent to commit robbery. On this charge he was convicted by the verdict of a jury and sentenced by the court to serve a term of 7 years in the Nebraska State Penitentiary. He has filed in this court a petition in error wherein he declares that he was erroneously convicted and sentenced, and by which he seeks a reversal of the conviction and sentence. He is plaintiff in error here but for convenience will be referred to as the defendant. The State is defendant in error but will be referred to as the State.

By the information on which the defendant was tried it is charged that on or about June 27, 1959, the defendant in the county of Douglas and State of Nebraska committed an assault upon Betty Mae Higley with the intent to commit a robbery. It was on this charge that the defendant was convicted and sentenced.

The brief of defendant contains three assignments of error on which he predicates a claim that he is entitled to a reversal. Only one of them requires consideration. By this one it is asserted that the court erred in submitting the charge to the jury. The basic contention is that the State failed to prove the charge and that on that account a motion for directed verdict made at the close of the State's evidence and again at the close of all the evidence should have been sustained.

There are of course two essential elements of the

crime charged against the defendant. The two are the assault and the intent with which it was committed.

The evidence taken at the trial was sufficient to sustain a verdict that a violent and vicious assault was committed upon Betty Mae Higley, who will be referred to hereinafter as the prosecutrix, and that it was committed by the defendant. One witness, and the only one outside the prosecutrix who observed the incident, identified positively the defendant as the person who committed the assault. The prosecutrix, as the result of observation made during the assault and her view of the defendant afterwards, gave it as her opinion that the defendant committed the assault.

If therefore the verdict and sentence must be set aside it must be on account of the failure of the proof of intent to commit a robbery of the prosecutrix.

Intent necessary to constitute the offense with which the defendant is charged is specific intent to commit a robbery. Before it may be said that the conviction may be sustained it must be found that this specific intent has been proved.

In Vallas v. State, 137 Neb. 250, 288 N. W. 818, this court said: "The authorities are agreed on the general proposition that, in a prosecution for assault with intent to kill, the specific intent to take life is the gist of the offense. The intent must be proved as charged."

That was a case involving intent to kill rather than intent to rob as here. The rule however is the same in all situations where specific intent is an element of a crime. See, 22 C. J. S., Criminal Law, § 32, p. 91; Botsch v. State, 43 Neb. 501, 61 N. W. 730; Swartz v. State, 121 Neb. 696, 238 N. W. 312; Garofola v. State, 121 Neb. 850, 238 N. W. 755.

A review of the evidence on the question of whether or not intent was proved discloses that on the date mentioned the prosecutrix and one Evelyn Rochford were with their husbands in attendance at the races being held at Ak-Sar-Ben Field and that while there

the two women entered a restroom provided for women. Inside the facility were at least two individual compartments. These have been referred to as toilets. After the two went in, the prosecutrix entered one of the compartments. Evelyn Rochford remained outside at least a part of the time in the vicinity of or in front of a mirror. The prosecutrix had with her a purse. She said that as she came out of a door a man struck and continued to strike her violently. From the record it may not be determined whether the door from which the prosecutrix was emerging was the door to the compartment or a door to the restroom. It appears inferentially to have been the door to the compartment. Evelyn Rochford turned and saw the man striking the prosecutrix. At the trial, as pointed out, this witness identified the defendant as the assailant. The two women screamed, Evelyn Rochford ran for help, and the assailant fled. Soon thereafter and some considerable distance away the defendant was apprehended. There is evidence that when apprehended he had fresh blood on one of his hands.

The substance of the theory of the State as to intent is that the intent of the defendant was to take from the prosecutrix her purse. On the record nothing else could have been the subject of the alleged intent.

The prosecutrix testified that at the time of the assault she had the purse in her hand. After the assault it was found on the floor in one of the compartments. Whether it was in the one which had been occupied by the prosecutrix or another one does not clearly appear. The prosecutrix did not testify that her assailant attempted to take the purse from her or that by any act he indicated that he intended to take it. She did not testify that he made any remark which directly or in essence indicated an intention to take the purse. In truth, no inquiry was made of her on the trial the effect of which was to seek to elicit information on the subject of the intent of the assailant. Evelyn Rochford,

the only other witness to the incident, did not testify to anything from which it could be said that there was an intent to take the purse. She testified that she did not know that the purse had been missing until the prosecutrix told her it had been returned.

There is other evidence relative to the purse but none that amounted to competent evidence bearing upon the intent of the assailant. Fay Hiykel, a detective sergeant of the Omaha police force, who came onto the scene after the assault testified: "I then ran to the women's lavatory, and they said a woman had been assaulted and some one grabbed her purse."

Ceola Turner, a restroom attendant, testified that she saw the assailant running away from the scene. She testified that "they" said the prosecutrix missed her pocketbook, and one of the ladies said it was in the toilet. The witness said she went and got it and gave it to one of the ladies. She further testified that the prosecutrix stated that her purse had been taken.

The statements of the witnesses Hiykel and Turner cannot be regarded as proof of an intent to commit a robbery. On their face they are not and do not purport to be direct statements of fact or of circumstances based upon knowledge in proof of an intent to commit a robbery by the assailant. There is no other evidence in the record bearing on this question.

This record leaves the element of intent necessary to sustain a conviction without any evidentiary support. This renders the conviction and sentence erroneous. The judgment of the district court is reversed.

REVERSED.

SIMMONS, C. J., participating on briefs.

EDWARD D. KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
105 N. W. 2d 710

Filed November 10, 1960. No. 34806.

1. **Criminal Law.** The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.
2. ———. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties.
3. ———. It is proper to set out the aggravation of a criminal offense justifying the heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information.
4. ———. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute.
5. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
6. ———. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case.
7. **Continuances: Appeal and Error.** The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial.
8. **Criminal Law.** The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion.
9. **Burglary.** The material elements of the crime of possession, custody, or control of instruments or tools under section 28-534, R. R. S. 1943, with intent to break and enter may be proved by direct or circumstantial evidence.
10. ———. In a prosecution for possession of burglar's tools and implements, the ownership thereof is ordinarily immaterial.
11. ———. In such a case, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have con-

structive possession or one may have actual possession and the other, constructive possession.

12. ———. The possession of burglarious implements or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense.

13. ———. The words "possession, custody or control" as used in section 28-534, R. R. S. 1943, express an alternative of terms, definitions, or explanations of the same thing in different words.

14. **Weapons.** As a general rule, absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant and a weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by defendant.

15. **Criminal Law.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.

16. **Criminal Law: Trial.** It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

17. ———: ———. In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

18. ———: ———. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

19. **Criminal Law.** Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.

20. ———. An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This is a criminal case prosecuted in the district court for Douglas County upon an information originally filed February 9, 1959. Count I therein charged that on or about January 12, 1959, defendant, Edward D. Kennedy, was found in Douglas County having in his possession, custody, or control certain described instruments or tools with intent to break and enter into a building containing property of value. Such information charged in count II that on or about the same date in Douglas County said defendant unlawfully carried two described 38-caliber loaded revolvers concealed on or about his person. Thereafter, on September 16, 1959, such information was amended but only by adding count III, which factually charged that defendant was an habitual criminal, having twice theretofore on separate designated dates pleaded guilty in Douglas County to the offense of burglary and been duly sentenced therefor.

Defendant at all times here involved was represented by counsel, and after a plea of not guilty trial was had to a jury upon counts I and II. Defendant's motions to direct a verdict made at conclusion of the State's evidence and renewed at conclusion of all the evidence were overruled and the issues were submitted to the jury. Thereafter, the jury returned separate verdicts finding defendant guilty upon each of said counts. After hearing thereon, defendant's motion for new trial was overruled and a hearing was duly held by the court upon

count III, whereupon defendant was found to be an habitual criminal and was sentenced to serve 15 years in the Nebraska State Penitentiary and to pay all costs of prosecution upon each of counts I and II of the information. However, such sentences were ordered to run concurrently.

Thereafter, defendant prosecuted error to this court, assigning and arguing, as far as important here, that the trial court: (1) Erred in refusing to sustain defendant's two oral motions for continuance, one of which was made at commencement of the trial, and one of which was made thereafter at the conclusion of defendant's evidence and before he rested; (2) erred in not sustaining defendant's motions for directed verdict; (3) erred in not admonishing the jury to disregard certain alleged inflammatory statements made by counsel for the State in closing argument, which allegedly reflected on failure of defendant to take the stand in his own defense and explain the presence of the tools and guns in his car; (4) erred in refusing to sustain defendant's motion for new trial; and (5) erred in finding that defendant was an habitual criminal and sentencing him as such. We do not sustain the assignments.

At opening of the trial, defendant's counsel orally moved for "a continuance on the ground that we did not receive the amended information within time to prepare a proper defense for the trial." In that connection, counts I and II of the amended information were at all times identical with the original which had been on file since February 9, 1959. The information, as amended, simply included count III, which factually charged that defendant was an habitual criminal.

In Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, this court held that: "The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the

information are determinative of the penalty to be imposed.

"The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties.

"It is proper to set out the aggravation of a criminal offense justifying the heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information."

Section 29-2221, R. R. S. 1943, provides, in part, that: "(1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten nor more than twenty years; Provided, that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern.

"(2) Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the

accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal."

In Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422, this court, dealing with a charge that accused was an habitual criminal, held that: "When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute."

Thus, whether or not defendant was an habitual criminal was not an issue upon defendant's trial of the felonies charged in counts I and II, but was one required to be heard by the trial court alone after the trial was held and defendant was found guilty. Verdicts of guilty on counts I and II were returned October 15, 1959, and hearing by the court alone on count III after notice was not held until December 21, 1959. Thus, defendant had ample time to so present his defense, if any, to count III.

On the other hand, one of defendant's counsel argues that he entered the case as counsel for defendant on October 5, 1959, and was forced to trial on October 13, 1959. However, the record discloses that one of defendant's two counsel who served throughout the trial first appeared in court as counsel for defendant on September 23, 1959, 3 weeks before the jury trial commenced. The original information was filed February 9, 1959, and on August 28, 1959, defendant's then counsel of record was permitted upon application to withdraw as counsel for defendant. On that same day, defendant being an indigent, the public defender of Douglas County was appointed to represent defendant, with the case set for trial September 21, 1959. On September 16, 1959, the amended information was filed, which simply added count III to the original information. De-

fendant was arraigned September 17, 1959. Thereat, with the public defender present and representing him, defendant pleaded not guilty and motion of the public defender for continuance was denied, with trial set for September 21, 1959. However, on motion and for cause shown, the order of September 17, 1959, denying continuance was vacated and the trial was continued until September 28, 1959. On September 23, 1959, defendant, having discharged the public defender as his counsel, appeared in open court with one of his counsel who represented him then and at the trial, and a continuance was granted until September 30, 1959. Trial was not had even on that date because of intervening motions unimportant here, and the cause came on for trial October 13, 1959, whereat before any evidence was adduced one of defendant's counsel made the oral motion for continuance heretofore set forth.

As recently as Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649, we reaffirmed that: "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby."

Also, as held in Cox v. State, 159 Neb. 811, 68 N. W. 2d 497, 66 A. L. R. 2d 293: "In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case." See, also, § 25-1148, R. R. S. 1943.

This record shows that defendant was at all times well aware of the charges against him; and that several months had elapsed since the filing of the information, during all of which time he was represented by and had the services of at least four lawyers, and at least one of those who represented him at the trial appeared as counsel of record 3 weeks before the trial. The record contains no showing by affidavit or otherwise that the granting of a further continuance was required to fairly try the simple issues here involved. We conclude that

the trial court did not abuse its discretion in denying the continuance first requested.

Defendant's second motion for continuance was orally made at conclusion of defendant's evidence just prior to the time he rested. Such motion was purportedly made in order to verify information that there was a material and important witness believed to be incarcerated in Colorado. However, defendant's counsel did not know "whether he has been in jail there or whereabouts there, * * *." The trial court then inquired of defendant's counsel if he was prepared in support of his motion to state the name of the witness and in substance what his testimony might be in support of the motion for continuance. In reply, counsel did not disclose the name of the witness but was evasive and did not say who or where the witness was or what his testimony would be except to state in substance that he believed it was direct testimony showing knowledge of the prior location and ownership of the burglary tools and weapons. With regard to defendant's aforesaid request for continuance, we find in this record no proper showing of the name or whereabouts of such a witness or the materiality of his testimony if such a witness existed or could be found. The whole request and proposal was entirely speculative and conjectural without any proper showing of diligence or materiality. We conclude that the trial court did not abuse its discretion in overruling defendant's second motion for continuance.

In that connection, at the hearing upon defendant's motion for new trial, after a continuance thereof had been granted, the deposition of an unemployed and thrice-convicted felon, who had no permanent address and was then in the Denver County jail on another alleged offense, as was one Bevins hereinafter mentioned, was offered by defendant and received in evidence, purportedly to support his motion for new trial. One of defendant's counsel also testified under oath

that the evidence contained in the deposition was not "actually in the realm of newly discovered evidence; * * *." Evidently, the purpose of offering the deposition was to support defendant's contention that his aforesaid requests for continuance, wherein no showings were made and which were properly overruled, should now in effect be retrospectively granted by the awarding of a new trial. The substance of the deposition was that the witness owned the tools and guns found in defendant's car where he had purportedly thrown them during the early evening of January 12, 1959, in order to avoid being caught in possession thereof and arrested therefor. We find that his testimony was not only immaterial, as heretofore pointed out, but it was also so equivocal, indefinite, fantastic, and incredible that it would reasonably support no other conclusion except that it was false.

In Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698, we reaffirmed that: "In a prosecution for possession of burglar's tools and implements, the ownership thereof is ordinarily immaterial."

Also, in Hubbard v. State, 65 Neb. 805, 91 N. W. 869, this court held that: "The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial.

"The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion." We conclude that the trial court did not err in refusing to give defendant a new trial upon the grounds aforesaid, as contended by him.

We turn then to defendant's contention that the trial court erred in refusing to sustain his motions to direct a verdict of not guilty for insufficiency of the evidence to support a conviction.

Section 28-534, R. R. S. 1943, provides in part: "Who-

ever shall be found having upon him or her, or having in his or her possession, custody or control, any picklock, crow, key, bit or other instrument or tool with intent feloniously to break and enter into any * * * building containing valuable property, shall be deemed guilty of a felony, and punished by confinement in the penitentiary not less than one year nor more than five years."

Also, section 28-1001, R. R. S. 1943, provides in part: "Whoever shall carry a weapon or weapons concealed on or about his person such as a revolver * * * shall upon conviction be fined in any sum not exceeding one thousand dollars or imprisoned in the state penitentiary not exceeding two years; * * *." Thereafter follows a proviso which has no application here.

In Phillips v. State, *supra,* this court concluded that the material elements of the crime of possession, custody, or control of instruments or tools under section 28-534, R. R. S. 1943, with intent to break and enter may be proved by direct or circumstantial evidence.

Therein we also held that: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.

"It is the province of the jury to determine the circumstances surrounding and which shed light upon the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

"In such a case, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession or one may have actual possession and the other, constructive possession.

"The possession of burglarious implements or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense.

"The words 'possession, custody or control' as used in section 28-534, R. R. S. 1943, express an alternative of terms, definitions, or explanations of the same thing in different words."

In that opinion we said: "In that connection, section 28-1001, R. R. S. 1943, containing exceptions having no application here, makes it a felony to carry a revolver concealed on or about his person. In Bright v. State, 125 Neb. 817, 252 N. W. 386, a conviction was affirmed where the evidence disclosed that defendant was carrying a revolver concealed but readily accessible either in a motor vehicle operated by him or on his person while operating the same. The weight of authority sustains such position. See, 56 Am. Jur., Weapons and Firearms, § 10, p. 996; Annotation, 50 A. L. R. 1534; Annotation, 88 A. L. R. 807."

The Annotations, 50 A. L. R. 1534, and 88 A. L. R. 807, cite and discuss many authorities dealing with situations comparable with that at bar. They are authority for the conclusion that the manifest object under statutes comparable with section 28-1001, R. R. S. 1943, was to prevent the carrying of concealed weapons and stamp out practices that have been and are fruitful of bloodshed, misery, and death. Thus, the courts generally hold, including our own, that absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant, and that a weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his

person or in a motor vehicle operated by defendant.

In the light of the foregoing rules, we have examined the record which shows that the State adduced the following undisputed evidence: On the night of January 12, 1959, two officers of the Omaha police department were serving as cruiser patrolmen on Radial Highway near Saddle Creek Road and Cuming Street in Omaha. About 9:15 p. m., they saw a 1957 Chevrolet four-door car make a left turn from east to north through a red light signal on Forty-third Avenue and Radial Highway while driving about 25 miles an hour. The officers followed that car and flashed their spotlight through its rear window. As the cruiser car followed the Chevrolet it accelerated its speed, turned east on Izard Street, went through a stop sign at Forty-second Avenue, speeded up to about 60 to 70 or 80 miles an hour, then made a left turn to go south on Fortieth Street to Webster Street, where it attempted to turn east at Fortieth and Webster Streets and the Chevrolet went out of control, struck the curb, and the right door flew open but was closed again. The pursuing police car's red light and siren were on at all times after making the turn at Izard Street, but the Chevrolet continued to accelerate its speed and did not slow down or stop. The streets were patched with ice, and were wet, slushy, and slippery. After rounding the corner of Fortieth and Webster Streets, the Chevrolet started "fish-tailing" and continued to do so for about a block, when it spun around and slid backwards up over the curb into a school fence then came back out a few feet toward the street. However, the officers stopped the cruiser car up against the front bumper of the Chevrolet to prevent further escape and then got out of the cruiser car. During the chase the officers saw three shadows or silhouettes of men through the back window of the Chevrolet as their spotlight was trained upon it. Another police officer in another car also saw the Chevrolet at the time it turned through a red light and

recognized defendant as the driver and one Bevins as another occupant in the front seat. He did not see any other occupant and when the Chevrolet stopped only two men got out. Defendant got out from the driver's side and Bevins got out from the right front seat. The officers recognized both such men from previous history in criminal cases, so, although they offered no resistance, one officer covered them with his sidearms while another handcuffed them. Later, when the Chevrolet was being towed from the curb into the street in order to take it to the police station, screams were heard from under the Chevrolet and another man, wet, cold, and injured somewhat was found hiding beneath the car by clinging to its undercarriage.

When defendant and Bevins got out of the Chevrolet the arresting officer opened a back door of the car and found, visible for the first time, a satchel of tools; an overcoat; and two snub-nosed, fully-loaded, 38-caliber revolvers on the back seat. The satchel was open and some tools protruded therefrom. The two revolvers were lying beside the satchel and on the overcoat in about the center of the back seat, as if thrown there in flight but where they were readily accessible to the occupants of the Chevrolet and invisible until the back doors of the car were open. Another officer arrived at the scene and took pictures of the back seat of the car through an open door. One such picture, showing the tools, coat, and guns so lying on the back seat, was offered and received in evidence.

The satchel contained two steel pinch bars; a steel-handled ax; a coping saw; a 10-pound sledge hammer with the handle sawed off shorter, as is usually done by burglars; a pair of vise-grip pliers; a pair of ordinary pliers; two cold chisels; a center punch; and another punch. A length of six- or eight-strand rope, knotted every 12 or 18 inches, which rope was of the length and type generally used by burglars to get into buildings or to descend from a roof, skylight, or window thereof,

was also found lying on the ground near the right open door of defendant's car.

At the time of defendant's arrest he was asked by an officer: " 'Is that your car?' And he said, 'yes, it is.' I said, 'Are you sure it is not your mother's?' He said, 'No, it is my car, and it is registered to me.' I said, 'What about the tools in the back seat.' He said, 'What tools.' And then I asked him where he was living, and he says 'Out on Dodge Street in the Clay Court.' "

A captain of police in Omaha, then serving in a supervisory position over burglary investigations in the detective bureau, who had 24 years of police experience and had many times investigated burglaries and viewed and examined tools used in burglaries, testified as a witness for the State. He testified that the rope, tools, and weapons found in defendant's car were a most complete set of burglar tools, although, as usual, some of them could be used for legitimate purposes. He also explained and demonstrated how each item found in defendant's car could be used in a burglary. On cross-examination of such witness by defendant's counsel, in answer to a question whether the tools found in defendant's car had been used in a burglary, the captain answered that such tools had been sent to the Federal Bureau of Investigation in Washington where they had been compared with other evidence that had been sent in from this district, and that he had thereafter received from such bureau a report which had been sent to the Omaha police department wherein it was pointed out that two of such tools were positively and conclusively identified as having been used in a burglary of the Scofield Seed Company in Council Bluffs, Iowa, on January 3, 1959. Such report of the bureau was produced in open court for the scrutiny of defendant's counsel and its authenticity and accuracy were not questioned, but the report was not offered and received in evidence.

Defendant did not testify, but he offered the testimony

of two lay witnesses that they owned tools similar to some of those found in defendant's car, and that they had useful legitimate purposes, which, as heretofore shown, the State had admitted.

This court has repeatedly held that: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672. See, also, Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576; Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113. We conclude that the evidence adduced herein was amply sufficient to support a verdict of guilty on counts I and II, and that the trial court did not err in failing to sustain defendant's motions for directed verdict.

Defendant assigned that the trial court erred prejudicially in failing to admonish the jury to disregard misconduct of counsel for the State during argument wherein he related: "He asked him who owned the car, and there isn't any question, Mr. Kennedy said I own the car. He asked again does your mother own the car. No, I own it. Is this car registered in your name? It is my car. Where do you live? In a Motel on West Dodge. What kind of tools does a man use if he is in a Motel on West Dodge? Should he have just any tools." In the first place, we point out that defendant never asked the court to admonish the jury to disregard any statements of the prosecutor and never sought a mistrial because thereof. Counsel for defendant did object to the statement aforesaid simply because "there is no showing in evidence as to occupation" of defendant, and the objection was overruled. It is a fact that there was no evidence adduced with regard to defendant's occupation which would justify his carrying the tools which were found in his car. Thus, every fact related

by the prosecutor in the quoted statement was based on evidence and legitimate inferences drawn therefrom. Also, contrary to defendant's contention, the statement did not reflect in any manner upon defendant's failure to take the stand. In that connection, instruction No. 18 given by the trial court, cautioned the jury that the law did not require defendant to take the stand; that the fact that defendant did not take the stand and testify was not to be considered by the jury in any manner; and that the jurors were not at liberty to draw any inference against him by reason of his failure to take the stand or to speculate in any manner because of his failure to testify.

In Jackson v. State, 133 Neb. 786, 277 N. W. 92, this court held that: "Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct." See, also, Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, wherein we held: "An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct." Defendant's assignment with regard to misconduct of counsel for the State has no merit.

Defendant's last assignment of error deals with his claimed invalidity of the first of two prior convictions of defendant for burglary, whereat, as shown by court records and other evidence in this record, defendant had pleaded guilty and was sentenced for such felonies. The State relied upon both such prior convictions at the hearing by the court on count III of the information which charged that defendant was an habitual criminal. Defendant's contention was and is that his first conviction was void because defendant was less than 16 years of age when he was sentenced, therefore he was erroneously sentenced to serve 2 years in the Nebraska State Reformatory. In the first place, we conclude that

defendant failed to establish by any competent evidence that he was less than 16 years of age when he was so convicted and sentenced. The record of his first conviction upon a plea of guilty and his sentence as well, which imports validity, disclosed by judicial recitation that defendant was not less than 16 years of age at the time of his conviction and sentence. This court recently reaffirmed and concluded in Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161, that an unauthorized or erroneous sentence does not void a lawful conviction. In any event the age of an accused when he has been twice convicted, sentenced, and committed to prison on a felony charge has no bearing on the question of whether or not he was an habitual criminal within the statutory meaning thereof.

For reasons heretofore stated, we conclude that in all respects the judgment and sentence of the trial court should be and hereby are affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

SCHOOL DISTRICT NO. 145 OF LANCASTER COUNTY, NEBRASKA, ALSO KNOWN AS THE SCHOOL DISTRICT OF THE VILLAGE OF WAVERLY, LANCASTER COUNTY, NEBRASKA, APPELLANT, V. MAURICE ROBERTSON, APPELLEE.
105 N. W. 2d 735

Filed November 10, 1960. No. 34811.

1. **Pleading: Trial.** In order that a recovery may be had in an action the pleadings and the proof must agree.
2. ———: ———. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree.
3. **Contracts: Pleading.** The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Perry, Perry & Nuernberger, for appellant.

Francis M. Casey, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action at law by School District No. 145 of Lancaster County, Nebraska, also known as the School District of the Village of Waverly, Lancaster County, Nebraska, plaintiff and appellant, against Maurice Robertson, defendant and appellee, to recover $1,473.62 with interest at 6 percent per annum on $1,312 from the date of the commencement of the action. The trial started as one to a jury but during its course a jury was waived and it proceeded as from the beginning as a trial to the court. At the conclusion of the trial a judgment was rendered in favor of the plaintiff for $137.50 only, with interest at 6 percent per annum from May 25, 1956, to April 16, 1959, and the costs of the action to April 16, 1959, with the balance of the costs taxed to the plaintiff. A motion for new trial was filed by plaintiff. This motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The pleadings on which the case was presented were an amended petition and an amended answer.

By the petition the plaintiff substantially pleaded that it was a duly organized school district and body corporate having the powers of a corporation for public purposes under the laws of the state and that it operated a school in Waverly, Nebraska, known as the Waverly Consolidated School.

It was further pleaded that the defendant was a nonresident of the plaintiff district and that he resided in another district with four minor children of school age which district provided and maintained an approved public school for all grades including high school in

which the children could have secured instruction, but for personal reasons he chose to send his children to the school of the plaintiff district for the period involved in this action. The defendant by his answer and by testimony admits that the allegations in this portion of the petition are true.

The plaintiff further pleaded that in about the month of January 1951, it entered into an oral contract with the defendant whereby it was agreed that the minor children of the defendant should attend the school conducted by the plaintiff under which agreement the defendant was to pay tuition at the rate established by the plaintiff for nonresident pupils, which agreement was acknowledged at numerous times thereafter; that under this agreement children of the defendant attended the school of plaintiff for the years 1951 to 1956; and that there was due on the contract $1,312 with interest from June 1, 1956, making a total of $1,473.62, and interest on $1,312 from the date of the commencement of the action. The amount of $1,312 was for an alleged balance due for tuition for the school years 1954-1955 and 1955-1956.

By the amended answer defendant denied the oral agreement alleged by the plaintiff. He alleged that it was agreed that the children of the defendant should attend the school of the plaintiff for which he was required to pay only one-half of the established or scheduled rate of tuition. He alleged that on this basis he was indebted to the plaintiff in the amount of $137.50. By the answer he tendered payment of this amount. No reply to the answer was filed.

There is a complete absence of testimony from witnesses called by the plaintiff to establish the existence of the oral contract alleged to have been entered into in 1951. Likewise there is a complete absence of testimony as to any happening thereafter the effect of which could be construed as the renewal of an agreement entered into in 1951 or of an oral contract entered into

at any later date. The deposition of the defendant was taken before the trial. A part of this deposition was read in evidence at the trial by the plaintiff on the theory that it contained admissions against interest. The remainder of the deposition was read into the record by the defendant. In that there was no evidence which might be regarded as proof of the oral agreement alleged in the petition or any reaffirmation thereof.

The most that can be said of this evidence of the plaintiff is that it discloses that the children of the defendant attended the school as it is alleged they did; that demand was made upon the defendant for payment of tuition each year; that he paid the amounts demanded through the school year 1953-1954; but that for the school years 1954-1955 and 1955-1956, although demand was made, he paid only $1,037 and failed and refused to pay any amount in excess thereof.

At the conclusion of the evidence of the plaintiff the defendant moved in the alternative that the court dismiss the case or direct a verdict in favor of the defendant on the ground, among others that do not require mention here, that the action is by the petition based upon a specific oral contract entered into in January 1951, but that the record of the evidence is completely silent as to any such contract entered into at that time or at any other time. This motion was overruled.

It is interpolated here that no other theory was presented to the court by amendment to the petition or offer of amendment, or otherwise.

Thereafter the defendant put on his evidence. He testified as a witness in his own behalf. There is nothing in his testimony or in any other evidence adduced by him the effect of which was to prove the agreement alleged by the plaintiff or a reaffirmation thereof.

Unless something occurred the effect of which was to avoid its application, the rule which is applicable and controlling and entitled the defendant to have judgment in his favor on the entire pleaded cause of action

except as to the $137.50 with interest, which he tendered, is stated in Traver v. Shaefle, 33 Neb. 531, 50 N. W. 683, as follows: "The rule of law is inflexible that the allegations and the proof, allegata et probata, must agree." See, also, Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; Cunningham v. Brewer, 144 Neb. 211, 13 N. W. 2d 113; Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739; Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376.

In interpretation and application of this rule it was said in Foote v. Chittenden, 106 Neb. 704, 184 N. W. 167: "A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree." This was quoted with approval in Cunningham v. Brewer, *supra.*

The rule has application generally, and specifically it has application to suits on contracts. The rule is approved in Benson v. Walker, *supra,* which was, as is apparent from a reading of the opinion, a suit on a contract.

The plaintiff insists in effect by its brief that the answer of the defendant had the effect of avoiding the application. It insists that the answer contains what amounts to an admission of the existence of the alleged contract upon which the action is based. Nothing contained in the answer is capable of such a construction.

The existence of the contract alleged by the plaintiff was denied by the answer. An entirely different contract was affirmatively pleaded by the defendant. It was in no sense an admission of the cause of action pleaded by the plaintiff. It was not one which would permit of a recovery of anything more than $137.50 with interest. This question has received a sufficient answer in the declaration quoted herein that one will not be permitted to plead one cause of action and upon trial

rely on proof establishing a different cause. This is necessarily true if the reliance is upon proof, as is true in this case, the effect of which is to defeat the pleaded cause of action. There is no ground in this case to justify a departure from the rule that in a case the allegations and the proof must agree.

The district court found that the plaintiff had failed to establish by a preponderance of the evidence that the contract alleged in the petition was ever made and rendered its judgment accordingly. It gave the plaintiff judgment for $137.50 with interest at 6 percent per annum from May 25, 1956, to April 16, 1959, and the costs of the action which accrued to April 16, 1959, and taxed the subsequently accrued costs to the plaintiff. The defendant has not cross-appealed. The judgment of the district court was correct and it should be and is affirmed.

AFFIRMED.

MARY E. BUIE, APPELLANT, V. JUDSON H. BEAMSLEY, DOING BUSINESS AS ROYAL TV RENTAL & SERVICE CO., APPELLEE.
105 N. W. 2d 738

Filed November 10, 1960. No. 34825.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

Crossman, Barton & Norris, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought by Mary E. Buie in the district court for Douglas County as plaintiff, against Judson H. Beamsley, doing business as the Royal TV Rental & Service Company, defendant, to recover damages for personal injuries sustained by her when she was in the act of crossing a street and was struck by a truck owned and operated by the defendant. The trial court sustained the defendant's motion for directed verdict at the close of plaintiff's case, and dismissed the plaintiff's action. The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff appealed.

The plaintiff's petition alleged that on September 22, 1958, at about 3:30 p.m., the plaintiff was walking across Farnam Street from south to north on the west side of Thirty-eighth Street in Omaha, and was at all times within the crosswalk provided for pedestrians; that the defendant was driving his 1958 International panel truck westbound on Farnam Street in the northernmost driving lane; and that when the plaintiff was three-fourths of the way across Farnam Street she was struck on her right hip by the right front fender of the defendant's truck and as a result thereof was injured. Plaintiff's petition further alleged that the defendant was guilty of negligence in the following respects: (1) In failing to yield the right-of-way to the plaintiff as a pedestrian in violation of section 55-4.1 (a) of the Omaha traffic code; (2) in failing to keep a proper lookout for the plaintiff; (3) in operating his truck at such a speed that he was unable to stop before striking the plaintiff; and (4) in failing to divert the course of his truck so as to avoid hitting the plaintiff.

The defendant's answer alleged that on the date as

set forth in the plaintiff's petition he was driving his truck, as described therein, west on Farnam Street in the northernmost driving lane in a careful and prudent manner when the plaintiff suddenly, without warning, ran directly into the path of the defendant's truck and was struck thereby. The defendant's answer denied that he was guilty of any negligence, and further alleged that the sole and proximate cause of the accident was the negligence of the plaintiff which was more than slight in the following particulars: (1) In running from a place of safety into a place of danger directly into the path of the defendant's truck; (2) in running in front of the defendant's truck at a time when she knew or should have known that the defendant could not possibly stop in time to avoid striking her; (3) in failing to keep a proper lookout for oncoming traffic; (4) in entering the intersection at a time when she knew or should have known that she could not safely cross; and (5) in failing to exercise reasonable precautions while crossing said intersection. The answer denied each and every allegation contained in the plaintiff's petition not expressly admitted.

The plaintiff's reply to the defendant's answer was a general denial.

The plaintiff assigns as error that the trial court erred in sustaining the defendant's motion for a directed verdict at the close of the plaintiff's case and in dismissing the plaintiff's cause of action; and that the trial court erred in overruling the plaintiff's motion for a new trial.

The record discloses that the plaintiff was employed by the Child Saving Institute as a nurse's aid, and at the time of trial she was 54 years of age. On September 22, 1958, at about 3:45 p.m., she, as a pedestrian, was involved in an accident when she was struck by the defendant's truck. She was going to Thirty-eighth and Farnam Streets. It was a fair day, the sun was shining in the west, and there was no moisture on the pavement. The temperature was somewhere around 70 de-

grees. The plaintiff testified that Thirty-eighth Street runs north and south and Farnam Street is a one-way street running east and west with three westbound driving lanes, and a parking lane on each side of the street; that she proceeded east on the south side of Farnam Street to the southwest corner of Thirty-eighth and Farnam Streets where she stopped; that she waited on the southwest corner until several cars had passed by; that there was a lull in traffic and she stepped off the curb and proceeded north across Farnam Street; that at that time the closest cars were about a block east; and that she could see to the east as far as the Blackstone Hotel, which she judged to be about a block to the east. When she stepped off the curb she was in the crosswalk, which was unmarked. As she started across the street she was walking normally. She looked to the east for a second time when she reached the middle driving lane and saw cars about a block east of her. She was still in the crosswalk. She further testified that she saw a truck in the north driving lane about half a block to the east of her. She kept on walking and did not stop when she reached the middle driving lane, nor at any time while crossing the street. She again looked to the east, a third time, when she reached the north driving lane. At that time the truck was at the "west corner of the west end of" the Hinky Dinky store which is on the northeast corner of the intersection a few feet east of the exact corner of the intersection which is occupied by a parking lot serving the store. She further testified that the truck was moving at that time. She started to run, and after running about four steps she was struck by the truck while she was still in the crosswalk and about three steps from completing crossing the street. She was facing north when she was struck by the right front fender of the truck on her right hip. Just before she was struck, she heard the wheels of the truck skidding on the pave-

ment and making a screeching noise for about a second or two. She did not hear the sound of a horn.

On cross-examination the plaintiff testified that she was unable to judge the speed of the truck, but that it was coming pretty fast. She was aware that there was a truck coming in the north lane when she was in the middle of the street, and when she heard the brakes being applied on the truck she ran three or four steps. She did not see the truck, but heard it when she started to run. She further testified that she could have stopped at any time before she reached the north driving lane; that she was walking at a normal gait; and that there was no other traffic in close proximity to her.

The following are applicable to the instant case.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633.

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices."

We conclude that under the facts as shown by the record in this case, the questions of the negligence of the defendant while driving his truck at the time of the accident, and the contributory negligence of the plaintiff, if any, are questions of fact to be determined by a jury.

For the reasons given herein, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

DELBERT TALBOTT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, V. CITY OF LYONS, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, IOWA ELECTRIC LIGHT AND POWER COMPANY, INTERVENER-APPELLANT.

105 N. W. 2d 918

Filed November 10, 1960. No. 34830.

1. **Pleading: Trial.** There can be no recovery if there is a material variance between the allegations and the proof. The allegata and probata must agree.
2. **Municipal Corporations: Estoppel.** Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class.
3. ———: ———. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.
4. **Estoppel.** The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel.

5. **Elections.** Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate an election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote.
6. **Municipal Corporations: Bonds.** A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal.
7. ———: ———. A municipal corporation may, and, when so required by constitution, statute, or charter, must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon, a common requirement being that the municipality shall at or before the issuance of the bonds, make provision for the collection of an annual tax sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal.

APPEAL from the district court for Burt County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Raun & Samuelson and *Cassem, Tierney, Adams & Henatsch*, for appellants.

John A. Young and *Perry, Perry & Nuernberger*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Charles Walton, as a resident, taxpayer, and legally qualified voter of the city of Lyons, brought this action in the district court for Burt County on behalf of himself, and all others similarly situated, against the city of Lyons, its mayor, councilmen, clerk and treasurer, and the Kirkpatrick-Pettis Company, a corporation. The purpose of the action is to permanently enjoin the defendants, and each of them, from taking any action for the purpose of carrying out the provisions of ordinance No. 272 of the city of Lyons. This ordinance was passed and approved by the city council and mayor on June 24, 1959, and then caused to be legally pub-

lished in a local newspaper. It was enacted for the purpose of issuing "negotiable bonds of the City of Lyons, Nebraska in the principal amount of fifty-four thousand six hundred seventy-five dollars ($54,675.00) in pursuance of the provisions of Chapter 19, article 7, Reissue Revised Statutes of Nebraska, 1943, as amended, for the purpose of raising funds to tender to Iowa Electric Light and Power Company the amount of the award of the condemnation court for the gas system owned by Iowa Electric Light and Power Company, prescribing the form of said bonds and providing for the levy of taxes to pay the same and the tender of $54,675.00 to Iowa Electric Light and Power Company." The ordinance discloses that the bonds have been sold to defendant Kirkpatrick-Pettis Company, an investment brokerage firm located in Omaha, Nebraska, and that the treasurer of the city was therein directed to deliver the bonds to it upon payment of the purchase price.

After the action was started, but before trial, Charles Walton withdrew therefrom and Delbert Talbott, who was then a resident and taxpayer of the city of Lyons, was, by order of court, substituted as plaintiff. Iowa Electric Light and Power Company, a corporation, owner of the gas distribution system in the city of Lyons, was, by order of court, permitted to intervene and did file a petition of intervention. Plaintiff and intervener both contend, as a basis for the injunctive relief sought, that the defendants, and each of them, are estopped from carrying out the provisions of ordinance No. 272 because of representations and promises, both oral and written, made by the mayor and city councilmen, both directly and indirectly, to the voters of the city of Lyons immediately prior to an election held on April 3, 1956, whereat the electors voted to have the city acquire the intervener's gas distribution system. These representations, it is claimed, were to the effect that only revenue bonds would be used to purchase intervener's gas distribution system if the

electorate voted favorably for the acquisition thereof.

Upon trial the court found generally for the defendants and against the plaintiff and the intervener; found that the prayer of both for a permanent injunction should be denied; dissolved a temporary restraining order it had caused to be issued; and then rendered a judgment accordingly, dismissing the plaintiff's petition and also that of the intervener. Plaintiff and intervener filed a motion for new trial and this appeal was taken from the overruling thereof. We shall herein refer to the parties as they appeared in the court below.

The principal question raised by this appeal is one of fact, that is, do the facts established estop the city from proceeding under ordinance No. 272 and should it be enjoined from doing so? However, before proceeding with that issue, there are two contentions made by defendants which require our attention. Defendants contend there is such a material variance between the allegations and proof that plaintiff and the intervener cannot sustain their position, citing our holding in Callaway v. Farmers Union Cooperative Assn., 119 Neb. 1, 226 N. W. 802, to support this contention. Therein we held: "There can be no recovery if there is a material variance between the allegations and the proof. The allegata and probata must agree." Plaintiff alleged: "Prior to the said election of April 3, 1956, the Mayor and City Councilmen of Lyons represented orally and by written literature that Revenue Bonds would be used by the City of Lyons for the purchase of said gas system if the electorate voted favorably for acquisition thereof; that many of the businessmen in the City of Lyons distributed preelection literature, prior to April 3, 1956, which represented that revenue bonds would be used to acquire said system, which representations were acquiesced in, and ratified by, the Mayor and City Council then in office on and immediately prior to April 3, 1956." Allegations contained in the petition of intervention are to the same effect. There is no evidence to the effect that

the mayor or councilmen represented to the voters of the city that if, at the April 3, 1956, election, they voted to acquire the gas distribution system that it would be purchased by issuing revenue bonds. However, plaintiff and intervener also alleged that the mayor and councilmen represented to the voters of the city of Lyons that only the earnings from the revenue of the gas distribution system would be used to purchase it. In view of the provisions of section 25-846, R. R. S. 1943, we shall consider the evidence adduced to see if it is sufficient to grant the relief that plaintiff and intervener here seek.

Defendants further contend that intervener, under our holding in May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, has no right at this time to question the source of funds which the city may use to purchase its gas distribution system in the city of Lyons. Therein we held, by quoting from Central Power Co. v. Nebraska City, 112 F. 2d 471, as follows: " 'The laws of Nebraska make adequate provision for the raising of money by cities to pay for property acquired under condemnation and since the Company must receive its payment before the City can take possession, the Company may not in this proceeding question how the City is to obtain the money with which it will pay.' " But intervener owns tangible personal property located in the city of Lyons, and taxable by it for city purposes, which is not a part of its distribution system located therein. Under this factual situation we think this contention to be without merit.

We fully discussed the doctrine of equitable estoppel as it applies to municipal corporations in the exercise of governmental functions in May v. City of Kearney, *supra*. See, also, City of Kearney v. Consumers Public Power Dist., 146 Neb. 29, 18 N. W. 2d 437; Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. In May v. City of Kearney, *supra*, we held: "Ordinarily the doctrine of equitable estoppel cannot be invoked

against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another." Therein we went on to hold, by quoting from People v. Thomas, 361 Ill. 448, 198 N. E. 363, that: "'The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, * * *.'" Therein we also said: "To preserve self government public officials in charge of, or in obtaining control of, such large public financial and economic operations must be held to strict accountability for promises and pledges made to the electorate who under the law and by their votes confer these powers upon them, in order that the electorate may cast an intelligent ballot and protect their personal and property rights." However, we went on to say: "'* * * while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances.'"

Plaintiff and intervener seem to think the factual situation here presented brings it within our holding as it relates to the facts presented in May v. City of Kearney, *supra*. Therein the voters of the city of Kearney authorized the city to acquire, by condemnation, the electric light and power plant and distribution system serving the inhabitants of that city owned by Consumers Public Power District. Prior to the vote authorizing the city to do so the mayor and councilmen advised the voters, through various means, that the only question to be decided by the election was what a

court would say was a fair price for the property sought to be acquired; that if the price set by the court seemed fair and reasonable to the mayor and city council that the proposition of issuing revenue bonds to pay for it would then be submitted to the voters; that only revenue bonds would be used to pay for the purchase price; and that general obligation bonds payable by the city from the levy and collection of taxes would not be used. After an election was held to issue revenue bonds, which the voters defeated, the city attempted to issue general obligation bonds. We enjoined it from doing so. No such factual situation is here presented.

The intervener's 25-year franchise to sell gas in the city of Lyons, allegedly a city of the second class located in Burt County, expired some time prior to April 3, 1956. About that time someone suggested to the mayor and council that the city ought to acquire the gas distribution system and operate it. To determine if that would be feasible the city, in the fall of 1955, employed the engineering firm of Fulton and Cramer to study the matter and report its findings to the city. This was done and a report was made and submitted. It set forth the estimated value of the distribution plant to be $38,000, and estimated an annual profit therefrom, under city operation, of $15,503. In view of the fact that the mayor and councilmen caused these estimates to be published and used them as a basis for saying that if the city would purchase the gas distribution system, it would, in their opinion, pay for itself, we call attention to what we said in Nickel v. School Board of Axtell, *supra*, by quoting from 19 Am. Jur., Estoppel, § 54, p. 660, that: " 'The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel.' " See, also, Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590; May v. City of Kearney, *supra*.

The matter of the city acquiring the gas distribution system of the intervener was thereafter submitted to the voters of the city at a general election on April 3, 1956. See § 19-701, R. S. Supp., 1955. It carried by a vote of 241 to 235. The value of the distribution system was thereafter fixed, by proper authorities, at $54,675. The city attempted to tender this amount by issuing its general obligation bonds, pursuant to ordinance No. 272. See § 19-704, R. R. S. 1943. It did not submit the question of issuing revenue bonds for this purpose to a vote of the electorate, as section 17-905, R. R. S. 1943, authorized it to do. It is plaintiff's and intervener's contention that because of representations made by the mayor and councilmen to the voters of the city, immediately prior to the election of April 3, 1956, that the city was required to submit to the voters of the city the question of issuing revenue bonds for the payment of the price fixed for the purpose of the distribution system and was, by reason of such representations made by its mayor and councilmen, estopped from issuing general obligation bonds under section 17-905, R. R. S. 1943.

After the mayor and councilmen had discussed the question of whether or not the city should acquire and operate the gas distribution system in the city, different members of the council, as well as the mayor and other businessmen of the city, made an investigation of the experience other cities had had in connection with operating the gas distribution systems in their respective cities. Some of these cities had acquired their gas distribution systems by the issuance of revenue bonds while others had used general obligation bonds for that purpose. Among the cities visited were Hastings, Pender, Ponca, and Alma. The experience of these cities and the report of the engineers were highly favorable to a successful operation thereof and convinced the mayor and councilmen that the gas distribution system,

if acquired, could be operated profitably and would pay for itself.

A public meeting was called and held in the city about March 15, 1956, to discuss the issue. At this meeting representatives of both sides, that is the mayor and city council as against the intervener, were present and explained to those present their views on the issue. A member of the firm of Fulton and Cramer was present. He first explained the report his firm had submitted to the city and thereafter answered any questions asked. Quite opposite views were expressed by representatives of the two sides, especially as to the earnings that could be expected. It was explained to those present that if the city were authorized to acquire the distribution system by a vote of the people that it could then issue general obligation bonds to pay for its purchase but that revenue bonds could also be used for that purpose but not unless another election was held and the voters favored doing so.

From the exhibits introduced it becomes apparent that the voters of the city were divided on the question of purchasing the gas distribution system. Forty-four businessmen, which included all the councilmen and mayor, published a full page ad in the local paper setting forth the factual situation as they found it to exist in other cities that had purchased their gas distribution system, setting forth the contents of the engineers' report, setting forth other factual data about the city of Lyons and its successful operation of other utilities, and setting forth a comparative gas rate schedule for comparable cities in size as to whether they owned or did not own their gas distribution system. It also contained a discussion of these facts. There is no evidence to show that these facts were not fairly and truthfully presented. The intervener put a full page ad in the local paper on March 29, 1956, explaining why it felt the city should not take over the distribution system and 68 individuals had their names on a handbill

put out for the same purpose. There was also a handbill put out by the mayor and councilmen the night before the election. We find nothing wrong with what was stated therein. It was an answer to contentions made by those opposed to the acquisition of the gas distribution system in what developed into a hotly contested election.

There is no evidence to the effect that the mayor or any member of the city council ever told anyone that only revenue bonds would be used by the city to purchase the distribution system. It is true they told everyone they believed that if the city purchased it that it would not cost the taxpayers a penny for it could be paid for out of profits arising from the operation thereof within a short number of years. There is ample evidence in the record to support such a view. It is true that some of the witnesses testified that they supposed, in view of what they were told that it wouldn't cost the city a penny, that only revenue bonds would be issued to pay for it. However, such a supposition is not sufficient to create an estoppel. The fact is that none of them said they relied thereon in casting their vote. It is apparent they did not. As we said in Nickel v. School Board of Axtell, *supra*: "It can also be said there is no evidence in the record that the electorate, or any part thereof, relied on this statement in voting at the election held on May 6, 1952. It is only contended it is reasonable to assume they may have. Such conjecture or surmise is not sufficient, in any event, to bring into play the equitable doctrine of estoppel." And in Inslee v. City of Bridgeport, *supra,* we said by quoting from 1 Dillon on Municipal Corporations (5th Ed.), § 213, p. 430: " 'Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate the election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote.' "

It is true that in May v. City of Kearney, *supra,* we

said: "That the electorate taxpayers relied upon the promises and pledges made by the mayor and city council in the case at bar may be and is inferred from the circumstances appearing in the evidence and need not be proved by direct evidence." However, that holding has no application to the facts herein presented.

We have considered the record before us and from all the evidence adduced have come to the conclusion that the voters on both sides were fully informed as to the question being presented to them at the election held on April 3, 1956, and that neither side was misled by what was said or done. It is true that the vote was close but such is our system of government where the majority controls.

It is plaintiff's and intervener's thought that sections 19-1302 and 19-1303, R. R. S. 1943, have application to the "sinking fund" provision of ordinance No. 272 and, by reason thereof, such fund is neither authorized by the statute nor has it been by a vote of the electorate of the city of Lyons.

Section 5 of the ordinance provides as follows: "The Mayor and Council shall cause to be levied and collected annually a tax by valuation on all the taxable property within the City sufficient in rate and amount to pay the interest on the said bonds as the interest becomes due and to create a sinking fund to pay the principal of said bonds when such principal becomes due."

These sections of the statute have no application to a situation, such as here, where the electorate voted, on April 3, 1956, to acquire the gas distribution system of intervener, which vote authorized the city to issue general obligation bonds for the purchase thereof. When such bonds are issued the city has authority to cause to be levied and assessed upon the assessed value of all the taxable property within the corporate limits of the city, except intangible property, such sums as may be authorized by law for the payment of outstanding bonds. See §§ 17-507 and 17-702, R. R. S. 1943.

"A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." Union P. R. R. Co. v. Buffalo County, 9 Neb. 449, 4 N. W. 53. See, also, 15 McQuillin, Municipal Corporations (3d Ed.), § 43.133, p. 697. That a sinking fund for the payment of bonds was anticipated by the Legislature is evidenced by section 77-2341, R. R. S. 1943. We think the following is applicable to the situation here presented: "A municipal corporation may, and, when so required by constitution, statute, or charter, must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon, a common requirement being that the municipality shall, at or before the issuance of the bonds, make provision for the collection of an annual tax sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal." 64 C. J. S., Municipal Corporations, § 1918, p. 512.

In view of what we have said and held herein, we find the action of the trial court dismissing both plaintiff's and intervener's petitions to be correct and affirm its judgment doing so.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PATRICK WAMSLEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
106 N. W. 2d 22

Filed November 18, 1960. No. 34764.

1. **Criminal Law: Trial.** Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt.

2. **Continuances: Appeal and Error.** The granting of recesses and continuances during a trial to permit a witness to compose himself after manifestations of emotion and hysteria while testifying is within the discretion of the trial court, and this court will not interfere with the trial court's ruling thereon unless an abuse of discretion is shown.
3. **Rape: Trial.** It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and that it is to determine the verdict solely from the evidence.
4. ———: ———. Where, in a prosecution for rape, the father of prosecutrix interrupts the trial during the cross-examination of prosecutrix by arising from the audience and saying "that's enough," and proceeds to the witness stand and escorts the prosecutrix therefrom, it is the duty of the court to remove any prejudice to the defendant arising therefrom, to reprimand the father for his conduct, to take necessary steps to prevent its recurrence, and to admonish the jury to disregard the incident in its consideration of the evidence.
5. **Criminal Law: Trial.** It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence.
6. **Rape: Appeal and Error.** Where incidents occur during the trial of a rape case which tend to create sympathy for the prosecutrix and hostility toward the defendant, it is the duty of the court, on request, to instruct the jury to disregard such incidents and to arrive at the verdict solely upon the evidence. A failure to give such an instruction under such circumstance ordinarily constitutes prejudicial error.
7. **Criminal Law: Appeal and Error.** The rule is that where, in a criminal case, any one of several errors assigned would not in itself be sufficient to warrant a reversal, nevertheless, if all of them in the aggregate justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of the court to award a new trial.
8. **Constitutional Law: Criminal Law.** A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury, and when it appears to this court that a defendant has not been accorded a fair trial its duty is to grant a new trial.

ERROR to the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, Frank E. Piccolo, Jr., and *James E. Schneider,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a prosecution for statutory rape against the defendant, Patrick Wamsley. The jury returned a verdict of guilty and the defendant was sentenced by the trial court to serve a term of 12 years in the State Penitentiary. The defendant seeks a review in this court by petition in error.

The information charged that the defendant, a male person over the age of 18 years, did on April 3, 1959, unlawfully and feloniously assault Melba Baker, a female child of the age of 15 years and not previously unchaste, and did unlawfully and feloniously carnally know and abuse the said Melba Baker. The charge was made pursuant to section 28-408, R. R. S. 1943.

The prosecutrix was born on August 11, 1943. Consequently she was 15 years and 7 months old on April 3, 1959, the date of the alleged offense. The evidence is undisputed that prosecutrix had sexual intercourse with defendant and four other boys on the night of April 3, 1959. All were more than 18 and less than 21 years of age. The four boys will be referred to as Sullivan, Faulkner, T. Herrod, and G. Herrod.

The evidence shows that a few days prior to April 3, 1959, Sullivan and Faulkner saw prosecutrix walking along a street in North Platte. They drove their automobile to the curb and asked her if she wanted to go for a ride and she declined to go with them. She did not know the boys and they did not know her. On a following Saturday the same two boys again saw prosecutrix

walking along a street and they again accosted her and asked her to go for a ride and get a bottle of pop. She told them that she had to go home and could not go with them. She told them who she was and Faulkner told her who he was. Faulkner asked for a date sometime and she said: "All right, if you want to call." She gave Faulkner her home address and telephone number. A few days later Faulkner called her to go for a coke and she stated she could not go because her mother was sick. Faulkner called again on April 3, 1959, and asked her to go to the show with him. After obtaining her mother's consent she accepted his invitation and agreed that he would call for her at 7:30 that evening.

The prosecutrix left with Faulkner in his car at the appointed hour. They went to a filling station where Sullivan, T. Herrod, and a brother of the latter not involved in this litigation entered the car. The brother of T. Herrod was taken home and the remainder of the group went to get a root beer. Thereafter they decided to buy some beer and drove back to the Herrod home to get G. Herrod to make the purchase for them. They saw defendant's car driving away from the Herrod home and they honked their car horn to get his attention. Defendant stopped and Faulkner's car was driven along side. Defendant and G. Herrod were in the car. The latter agreed to buy the beer and agreed to bring it to the sand pit south of the city. Defendant got into the Faulkner car and the group drove to the sand pit to await the arrival of G. Herrod with the beer. Within a few minutes G. Herrod arrived with four six-packs of beer which were placed in the Faulkner car. All except prosecutrix began drinking beer. Faulkner began to "neck" and "paw" the girl in the presence of the others. Admittedly Faulkner was having no success and an arrangement was made for the others to leave the defendant and prosecutrix alone in the car. Prosecutrix testified to defendant's efforts to have sex-

ual intercourse with her. She told him she wanted to go home. He persisted and she drew a small pocket knife which she held at his throat. Defendant admits that he grabbed her by the hair and took the knife from her. Defendant proceeded to have sexual intercourse with prosecutrix, which he avers was with her full cooperation and consent which she denies. Defendant left the car and Sullivan, Faulkner, G. Herrod, and T. Herrod in turn entered the car and had sexual intercourse with the prosecutrix. Sullivan then returned to the car and had sexual intercourse with her a second time. A third car containing two boys came and left very shortly before the end of the episode. Prosecutrix heard them come and made no outcry. All of the boys testified that prosecutrix was willing and cooperative, and offered no resistance. Prosecutrix does not deny that she did not physically resist after the knife incident with the defendant.

Defendant left the scene shortly after his sexual act with prosecutrix. G. Herrod also left, probably in the third car which had arrived near the end of the episode. Sullivan, Faulkner, T. Herrod, and prosecutrix drove around for a while and then went to obtain food and coffee. Thereafter the prosecutrix was taken home at about 12 midnight.

When prosecutrix arrived home her parents had retired for the night. She did not awaken them. She arose at 2 a.m., and went with her father to assist him in doing janitorial work at two local restaurants. She made no complaint to her father. Upon returning home at about 6:30 a.m., she awakened her mother and informed her of the previous night's events. She was taken to a doctor, and the sheriff was informed. Prosecutrix testified that her clothes were torn and that she observed blood on her underclothing and in the bed where she had slept. The five boys involved testified as to the clothing they were wearing at the time and that there was no blood on them. Prosecutrix testified

positively that she had never had sexual intercourse with any man previous to that time. The doctor who examined the girl testified that from the findings of the examination it was his opinion that the prosecutrix was chaste prior to the event on April 3, 1959. The defendant called a qualified physician who gave it as his opinion under the assumed facts which were supported by the evidence that prosecutrix was not previously chaste.

All of the elements of the crime charged were admitted by the defendant except the previous chastity of the prosecutrix. The time and place of the act, the identity and ages of the parties, and the perpetration of the acts of sexual intercourse are admitted by the defendant and the four boys with him. The only controverted issue was whether or not the prosecutrix was chaste prior to the time of the offense charged. The evidence on this issue was in conflict and presented a jury question, which the jury resolved in favor of the State.

The defendant assigns 25 errors, which he asserts deprive him of a fair and impartial trial. We shall give each of them the attention it deserves, considering the nature of the case and the contents of the record before us.

The defendant contends that the evidence is insufficient to prove the previous chastity of the prosecutrix beyond a reasonable doubt and that the trial court erred in not directing a verdict for the defendant and in not sustaining his motion for a new trial on that ground. We point out that the prosecutrix testified that she had never previously engaged in sexual intercourse. It is true that the credibility of the prosecutrix on this vital point was impeached by her sworn testimony at the preliminary hearing in the county court, which impeaching evidence will be more particularly discussed in connection with another point. Her evidence, however, was corroborated by the evidence of the examining physician. While there was substantial evidence to support the contention of the defendant that

prosecutrix was not previously chaste, it presented a question of fact to be determined by the jury. We find no merit in defendant's contention on this point.

The defendant contends that the trial court erred in refusing to declare a mistrial requested by the defendant following several hysterical and emotional outbursts, demonstrations, and breakdowns by prosecutrix on the witness stand. It is contended that such conduct and the recesses and continuances granted by the trial court as a result thereof had the effect of producing the utmost sympathy for the prosecutrix in the minds of the jurors and to arouse the jury to extreme passion and prejudice against the defendant. The record shows that several recesses of the court were taken for the purpose of permitting the prosecutrix to compose herself, and on one occasion the court was recessed from approximately 11 a.m. to 1:30 p.m. for such purpose, and at 1:30 p.m. court was recessed until 9:30 the next morning for the same reason.

The evidence shows that the prosecutrix did on several occasions during her cross-examination become emotional and hysterical, and that the trial court granted several recesses of the court as heretofore stated to enable her to compose herself in order that she could continue as a witness. There is nothing in the record as to what she said during these hysterical outbursts. There is evidence that after she retired from the courtroom such outbursts, at least on one occasion, were heard throughout the floor of the courthouse on which the courtroom is located. The record is not clear that this was within hearing of the jury. Counsel for the defendant objected to the continuance from 11 a.m. to 1:30 p.m. and from 1:30 p.m. to 9:30 the following morning and moved for a mistrial on the ground that the defendant was prejudiced from having a fair trial by the frequent outbursts of emotion and hysteria and the resulting recesses of the court. The motion for a mistrial was renewed when court resumed the following morn-

ing. The trial court overruled the motion for a mistrial. No admonition was directed to the jury to disregard the manifestations of emotion and hysteria, nor was the jury directed by the instructions to do so, although such an instruction was requested by the defendant. The question before this court does not appear to have been passed on in a case having any similarity to the present one.

In cases such as the one before us, manifestations of emotion and hysteria are not unnatural or unusual. No contention is here made that such manifestations were feigned and not spontaneous on the part of the prosecutrix. Whether or not such manifestations are prejudicial to the fundamental right of a defendant to a fair and impartial trial has been before other courts, with results that are not in all respects consistent. These cases are collected in an annotation appearing in 46 A. L. R. 2d 949.

We think the proper rule is that, where there are outbursts of emotion or hysteria in the course of the trial, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and insure a fair and impartial trial for the defendant. It necessarily follows that in the absence of an abuse of discretion an appellate court will not interfere with the rulings of the trial court thereon, such court having a much better knowledge of what occurred and the extent of the passion and prejudice that resulted therefrom than this court might glean from the printed record. We find no error in the action of the trial court in granting the recesses and continuances about which the defendant complains. It is true that the trial court failed to admonish the jury to disregard the manifestations of emotion and hysteria on the part of the prosecutrix, a matter which we shall consider in connection with another point raised in the case.

As a part of his motion for a mistrial the defendant

by his counsel stated that about 9:30 a.m. on the third day of the trial the father of the prosecutrix, during her cross-examination, arose from the audience and said "That's enough," and proceeded directly to the witness stand and assisted the prosecutrix therefrom. The State does not question the correctness of this statement. The trial court took no action. There is nothing in this record to indicate that the trial court reprimanded the father of the prosecutrix for his conduct, took any steps to prevent its recurrence, or admonished the jury to disregard the incident. While no objection was made at the very time the incident occurred, it was raised in the motion for a mistrial approximately 1½ hours later. The defendant offered an instruction dealing with the subject, which was refused.

The responsibility for conducting a trial in an orderly and proper manner for the purpose of insuring a fair and impartial trial for one charged with crime rests with the trial court, and it is vested with a wide discretion in so doing. In the absence of a clear showing that the trial court failed to control the situation and permitted the trial to get so out of hand as to necessarily have aroused passion and prejudice against the accused, the rulings of the court will not ordinarily be disturbed. But where a person injects himself into the trial as did the father of the prosecutrix, the duty of the court arises to act seasonably to control the situation by reprimanding the offender, by taking steps to prevent its recurrence, and by admonishing the jury to disregard the matter in order to dispel any passion or prejudice arising from it. In this instance none of these things were done. The trial court failed in its responsibility to assert the powers of the court in dealing with this intrusion upon the judicial process and in permitting the prejudice to the defendant arising therefrom to remain unalleviated. Wever v. State, 121 Neb. 816, 238 N. W. 736. Whether or not the matter was timely raised, it is proper to be considered along with other

errors appearing in the record, together with the general conduct of the trial, in determining if the accused had a fair and impartial trial, when assigned as error in the motion for a new trial timely filed.

The record shows that several recesses of the court were taken to permit the prosecutrix to compose herself as hereinbefore stated. A motion for a mistrial was made at the close of the evidence on the basis that the many manifestations of emotion and hysteria had the effect of arousing great sympathy for the prosecutrix and passion and prejudice against the defendant to such an extent that a fair and impartial trial could not be had. We do not here determine that a mistrial should have been granted. It was the duty of the court, however, to admonish the jury to disregard all incidents of the trial that tended to create sympathy for prosecutrix and prejudice to the defendant, and to further admonish the jury that it was the duty of the jury to try the case solely on the evidence properly before it and the instructions of the court, both by oral admonitions at seasonable times and by written instructions when properly requested. An instruction was requested in this case admonishing the jury to disregard the manifestations of emotion and hysteria by the prosecutrix, and that the jury should disregard sympathy for the prosecutrix and any prejudice toward the defendant, and try the case solely on the evidence.

The primary issue in the case is whether or not the prosecutrix was chaste. There is evidence by a physician that in his opinion she was not. The five boys involved testified to facts which clearly indicate that prosecutrix was not previously chaste. The prosecutrix testified positively that she had never previously had intercourse with a man. Her credibility was impeached by her own sworn testimony given at the preliminary hearing. The impeaching evidence not only went to her credibility generally but to the truth of her statement that she was previously chaste. The

nature of this impeaching evidence is such that we do not choose to repeat it here. It will be sufficient for us to say that it is not the evidence that could reasonably be expected from a poor innocent little girl, as the attorneys for the State proclaimed her to be in their arguments to the jury. It could reasonably be inferred from this sworn testimony given at the preliminary hearing that prosecutrix was not previously chaste. While the issue of chastity was for the jury, we point out that the manifestations of emotion and hysteria by the prosecutrix and the interruption of the trial and the escorting of prosecutrix from the witness stand by her father tended to create an atmosphere of sympathy for the prosecutrix and of passion and prejudice to the defendant which the trial court made no effort to minimize.

In addition to the foregoing the county attorney in his opening argument to the jury made the following statement: "And he (defense counsel) asked her point blank about her chastity, and she come back at him that she had never had intercourse before, and as I stand here, I heartily believe that with all my heart and soul, the way that she screamed, 'It isn't the truth,' because a little girl is not going to take the abuses and go up and take the stand in this case if she wasn't chaste," etc. The expression of the personal opinion of the prosecutor in a criminal prosecution, not based on the evidence, in arguing the case to the jury has frequently been condemned. Reed v. State, 66 Neb. 184, 92 N. W. 321; Olsen v. State, 113 Neb. 69, 201 N. W. 969; Balis v. State, 137 Neb. 835, 291 N. W. 477; Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666; Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258.

With the close issue of fact in this case as to the previous chastity of the prosecutrix, the personal opinion of the county attorney could well have supplied the jury with the motivating factor that tipped the scales in favor of the State. Objection was made at the close of the county attorney's opening argument. The objec-

tion was overruled without an admonition to the jury to disregard it, the least that the trial court could have done to alleviate the prejudicial effect of the statement.

The nature of the instant case is such that sympathy for the prosecutrix and prejudice to the defendant could easily be engendered in the minds of jurors. In such a case every precaution should be taken to insure a fair and impartial trial, however guilty the defendant appears to be. It is the duty of the trial court by every means at his command to see to it that a fair and impartial trial is had and that the verdict rendered is based on a dispassionate consideration of the evidence. In the instant case the defendant moved for a mistrial at the close of all the evidence on the ground that the incidents herein discussed precluded such a trial. This was asserted in his motion for a new trial as a basis for a new trial. Whether the motion for a mistrial was a prerequisite to its assertion in the motion for a new trial, we do not here determine. We do find that the trial court erred in not awarding the defendant a new trial.

It is clear from an examination of the whole record that the manifestations of emotion and hysteria on the part of the prosecutrix, and the improper conduct of the county attorney in expressing his personal opinions in his argument to the jury, had the cumulative effect of charging the atmosphere of the trial with great sympathy for the prosecutrix and with extreme hostility toward the defendant. It seems clear to us that the recited events occurring at the trial had the effect, in the aggregate, of creating such an atmosphere of hostility toward the defendant that it tended to make impossible a dispassionate consideration of the evidence by the jury. The great sympathy for the prosecutrix created by the cited incidents and the resulting hostility toward the defendant could have been alleviated by rebukes to those who violated established rules of conduct, by admonishing the jury orally or by written instruction to disregard such incidents occurring at the trial, by

reprimanding the county attorney for expressing his personal opinions not inferred from the evidence, and by admonishing the jury to disregard such irregularities and return a dispassionate verdict based solely on the evidence before it. People v. Brown, 81 Cal. App. 226, 253 P. 735.

It is true that one or more of the recited incidents might not, standing alone, constitute prejudicial error requiring a new trial, but their cumulative effect was to deprive the defendant of his constitutional right to a public trial by an impartial jury.

There is a paucity of cases in this jurisdiction dealing with accumulative error as a ground for a new trial where one or more of such errors, standing alone, may not constitute reversible error. But such question has arisen in other jurisdictions to which we shall refer.

In 24 C. J. S., Criminal Law, § 1887, p. 840, it is said: "The doctrine of harmless error does not apply where accused has been deprived of a substantial right, and it will not be extended to such an extent as to deprive accused of a fair trial, or a trial on the merits. One who is accused of crime is entitled to an impartial trial, and where the record shows prejudicial irregularities, a conviction will be reversed." See, also, People v. Aragon, 154 Cal. App. 2d 646, 316 P. 2d 370.

In State v. Gossett, 117 S. C. 76, 108 S. E. 290, 16 A. L. R. 1299, the court said: "The law has been broken and demands prompt punishment of the offender; the law guarantees to the accused a fair trial; the public interest is as much involved in the sanctity of this guaranty as in the swift retribution which should follow crime. A fair trial means a trial before an impartial Judge, an honest jury, and in an atmosphere of judicial calm. It requires a wise, fearless, and impartial mind to harmonize these elements of the public interest, lest in its haste to deal a blow the law may perpetrate a judicial wrong." In McMahan v. State, 96 Okl. Cr. 176, 251 P. 2d 204, the court said: "A fair trial is a legal trial, or

one conducted in all material things in substantial conformity to law." We agree with these general definitions of a fair trial. It implies a trial with sympathy for one party or hostility toward the other being kept at a minimum at all stages of the trial in order that a fair and impartial verdict may be returned under the evidence.

In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, we approved the following statement of the law: " 'An error which prevents proper consideration by the jury of the only question relied upon by the defendant is substantial, not technical, and we have no right to disregard it though we may approve of the verdict.' " See, also, People v. Rongetti, 338 Ill. 56, 170 N. E. 14.

In State v. Collins, 246 Iowa 989, 69 N. W. 2d 31, the court said: "But it is fair to say that in a criminal case where the error pertains to a matter calculated to arouse prejudice against defendant, we should be cautious in holding it to be nonprejudicial. 'Whether the error in a given case shall be regarded as harmless on appeal may often depend on the circumstances of the particular case rather than on any definite rules of law.' 24 C. J. S., Criminal Law, section 1887, page 841. And 'errors which might otherwise be regarded as harmless and unimportant may not be so considered in close cases.' "

In State v. Dolliver, 150 Minn. 155, 184 N. W. 848, the court stated: "And the rule is that, where any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet, if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse." See, also, United States v. Donnelly, 179 F. 2d 227; Ellis v. State, 86 Fla. 155, 97 So. 285.

In State v. Toloff, 123 Wash. 92, 211 P. 745, the court stated the rule as follows: "Many of these assignments of error might not, in themselves, if standing alone, be sufficiently prejudicial to entitle the appellant to a new

trial, but the sum total of them was exceedingly prejudicial, especially in view of the fact that the testimony tending to establish his guilt, although it presented a small basis for the jury to determine that he was guilty, was of such a feeble and unpersuasive character that we are of the opinion that it must leave, in the minds of a jury, a reasonable doubt, unless the jury was influenced by matters other than those appearing in the evidence."

In State v. Gevrez, 61 Ariz. 296, 148 P. 2d 829, the court said: "We cannot, however, find fault with the mother of the deceased, but we do say the laxness of the court in permitting her to remain so near the jury, and her deportment while there, were very prejudicial to the rights of appellant and should not have been allowed. * * * We hold that the defendant herein did not have a fair and impartial trial."

In State v. Long, 127 Mont. 523, 268 P. 2d 390, the court said: "Whatever the status of a defendant in a criminal case may be and whatever be the nature of the crime with which he is charged, each and all are entitled to the same fair trial guaranteed by our Constitution. The Constitution makes no distinction between defendants but treats all alike, as must this court, whose duty it is to see that defendants in criminal cases brought before us are accorded a fair trial."

We are of the opinion, as the result of our examination of this record shows, that defendant has not had a fair and impartial trial according to law and the established rules of criminal procedure to which every person, whether guilty or innocent, is entitled. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. RALPH E. KERSEY ET AL., APPELLANTS.

106 N. W. 2d 31

Filed November 18, 1960. No. 34791.

1. **Trial: Judgments.** When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.
2. **Trial.** Where the record in a civil case shows that a law action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived.
3. **Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
4. ———. In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
5. ———. In considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence.
6. **Insurance.** Where the word "permission" or "consent" appears in the omnibus clause of an insurance policy without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured.
7. ———. When an insurance policy provides that the insurer will pay reasonable expenses incurred within 1 year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing, and funeral expenses for each person who sustains bodily injury, caused by an accident, provided the automobile is being used by the named insured or his spouse if a resident of the household or with the permission of either, and the minor daughter of insured uses the automobile without the implied consent of the insured and an accident occurs resulting in injury to the occupants and the death of one

of them; Held, that no liability attaches to the insurer under the provisions of the policy.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Munro, Parker & Munro and *Dryden & Jensen,* for appellants.

John E. Dougherty and *Healey, Wilson & Barlow,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action brought in the district court for Buffalo County by the State Farm Mutual Automobile Insurance Company, a corporation, as plaintiff, against Ralph E. Kersey, Merreta Kersey, Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, Mrs. Ralph E. Kersey, first and real name unknown (the record shows that Mrs. Ralph E. Kersey is also known as Jessie Kersey), Joyce Kersey, and James Kersey, minors, defendants. Merreta Kersey, James Kersey, and Joyce Kersey, minors, were represented by a guardian ad litem. The purpose of the action was to obtain a declaratory judgment determining the liability of plaintiff, if any, under the provisions of an insurance policy issued by it to Ralph E. Kersey covering his 1952 Oldsmobile sedan, because of an automobile accident which occurred while Merreta Kersey, a minor daughter of insured Ralph E. Kersey, was driving his automobile, resulting in injuries to Merreta, James, and Joyce Kersey who were riding in the automobile, and causing the death of Gregory Beavers, a minor, who was also riding in said automobile.

This case was tried to the court without a jury. The trial court rendered judgment in favor of the plaintiff and against all of the defendants; that each of the defendants be declared to have no rights, titles, or inter-

est in and to the policy of insurance issued by the plaintiff to the defendant Ralph E. Kersey; that the plaintiff be relieved of the burden and expense of defending Merreta Kersey in an action brought in the district court for Buffalo County wherein Dale O. Beavers, as administrator of the estate of Gregory Beavers, deceased, was plaintiff and Merreta Kersey was defendant; that Dale O. Beavers, as such administrator, be declared to have no rights, titles, or interest in and to the said policy of insurance or its medical coverage provisions as a result of the accident occurring on August 31, 1956; that Ralph E. Kersey or any of the minor defendants be declared to have no rights, titles, or interest under the medical provisions of said policy; and that the plaintiff be relieved therefrom.

The defendants filed an application for special findings of fact. The trial court found that the application should be granted and that the same constituted a part of the journal entry filed in this cause. The trial court found that the defendant Merreta Kersey drove the automobile owned by the defendant Ralph E. Kersey alone on July 4, 1956, in Overton, Nebraska, with the permission of defendant Ralph E. Kersey; that the defendant Merreta Kersey drove the automobile of the defendant Ralph E. Kersey alone, with the permission of Ralph E. Kersey, in Smithfield, Missouri, during the summer of 1955; that the defendant Ralph E. Kersey permitted the defendant Merreta Kersey to drive the automobile on country roads and in the village of Elm Creek, Nebraska, a number of times during the year preceding the accident of August 31, 1956, when the defendant Ralph E. Kersey was with her and gave her driving lessons at said times; that the defendant Merreta Kersey drove the automobile owned by the defendant Ralph E. Kersey back and forth on the family driveway both with and without the express permission of the defendant Ralph E. Kersey, approximately 12 to 15 times prior to the accident; that the defendant Ralph E. Kersey had knowl-

edge that Merreta Kersey was driving the car on the driveway and never objected; that the defendant Ralph E. Kersey did not notify his daughter Merreta Kersey that she was not to drive the car on a country road at the time the accident took place or at any other time; and that the defendant Ralph E. Kersey used his automobile in his business and almost always drove the automobile when he left home.

The trial court further found that neither parent of Merreta Kersey gave permission, directly or by implication, to Merreta Kersey to drive the automobile on August 31, 1956; and that the evidence in the case neither expressly or impliedly gave or granted Merreta Kersey permission to drive said automobile other than in the company of her father.

The defendant Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, filed a motion for new trial. The defendants F. M. Parker, guardian ad litem for Merreta Kersey, Joyce Kersey, and James Kersey, minors, Ralph E. Kersey, and Jessie Kersey, filed a motion for new trial. The trial court overruled all of the defendants' motions for new trial, and defendants perfected appeal to this court.

It was stipulated by the parties that the plaintiff is a corporation authorized to do business in this state; that Ralph E. Kersey is a resident of Elm Creek, Nebraska, and the father and natural guardian of Merreta, Joyce, and James Kersey, minor children, and that Mrs. Ralph E. Kersey, also known as Jessie Kersey, is the wife of Ralph E. Kersey; that Dale O. Beavers is the administrator of the estate of Gregory Beavers, deceased, pending in the county court of Buffalo County; that the plaintiff, in Nebraska, entered into a policy of insurance with Ralph E. Kersey covering a 1952 Oldsmobile sedan automobile owned by him; that on August 31, 1956, while said automobile was being driven by Merreta Kersey it overturned on a country road north of Elm Creek; that at the time of the accident Joyce

Kersey, James Kersey, and Gregory Beavers were riding in said automobile; that it is the contention of Ralph E. Kersey and Merreta Kersey that at the time of the accident Merreta Kersey was driving the automobile with the permission of Ralph E. Kersey and her mother; that as a result of the automobile accident Merreta Kersey, Joyce Kersey, and James Kersey incurred injuries resulting in medical expense in a stated sum; and that the defendant Ralph E. Kersey claims an interest in the policy of insurance under its medical payment coverage for the amount of medical expenses.

It was also stipulated that Gregory Beavers sustained injuries by virtue of the accident which resulted in his instantaneous death and the funeral expense of $500 was paid by Dale O. Beavers personally; and that Merreta Kersey contends that the plaintiff is obligated to defend actions arising out of said accident brought against her.

The plaintiff's amended petition denied that Ralph E. Kersey and Dale O. Beavers had an interest in the insurance policy under its medical payment coverage, or that Dale O. Beavers had an interest in the insurance policy by reason of any obligation of the insurance company to indemnify Merreta Kersey in the event a judgment was rendered against her for damages resulting from the death of Gregory Beavers; further denied that it had an obligation to defend actions arising from the death of Gregory Beavers out of the accident; and further denied that Merreta Kersey was driving the automobile with the permission of Ralph E. Kersey and his wife at the time of the accident.

The answer of the defendants Ralph E. Kersey and his wife, insofar as need be considered, alleged that the Oldsmobile was operated by Merreta Kersey at the time of the accident as a family car of Ralph E. Kersey and kept and maintained for the use of the family, including Merreta Kersey; that Merreta Kersey was driving said automobile with the implied consent and permission of Ralph E. Kersey; that the plaintiff accepted

the defense of the claim of Dale O. Beavers and assured Ralph E. Kersey that the plaintiff would defend any claim against him as the insured by the administrator of the estate of Gregory Beavers, deceased, and would extend coverage under the policy to the named insured; and that in reliance upon the plaintiff's agreement to defend and extend such coverage, Ralph E. Kersey did not investigate the accident. The answer further alleged that the agents of the plaintiff informed Ralph E. Kersey and his wife that it was liable for medical payments and funeral expenses coverage.

The answer of the defendants Merreta Kersey, Joyce Kersey, and James Kersey, through their guardian ad litem, denied generally the allegations of the plaintiff's amended petition; denied that the plaintiff was without an adequate remedy at law; alleged that the automobile operated by Merreta Kersey at the time of the accident was the family car of the defendant Ralph E. Kersey and kept and maintained for the use of said family, including Merreta Kersey; and alleged that Merreta Kersey was driving and operating said automobile at the time of the accident with the implied consent and permission of the defendant Ralph E. Kersey.

The answer of the defendant Dale O. Beavers denied that the plaintiff was without an adequate remedy at law; and denied all of the allegations contained in the plaintiff's amended petition not admitted.

For convenience we will refer to the State Farm Mutual Automobile Insurance Company, a corporation, as the plaintiff; to the defendants as their names appear in the record; and to the 1952 Oldsmobile automobile as the Oldsmobile.

The defendants' assignments of error pertinent to this appeal are as follows: The trial court erred in finding that Merreta Kersey did not have implied permission to drive said automobile at the time of the accident; and erred in finding that the defendants should be

excluded from any and all interest of the medical payments coverage in the plaintiff's insurance policy.

There are certain established rules of law pertinent to the instant case, as follows.

When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. § 25-21,157, R. R. S. 1943. See, also, Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

Where the record in a civil case shows that a law action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived. Davis v. Snyder, 45 Neb. 415, 63 N. W. 789.

"The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. * * * In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong." Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

"In considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence." Dunbier v. Stanton, *supra*. See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

The record shows that on March 19, 1957, Ralph E. Kersey, as plaintiff, brought an action in the district court for Buffalo County against the State Farm Mutual Automobile Insurance Company, a corporation, defendant, to recover medical expenses under the provisions of a policy of insurance issued to the plaintiff by the defendant.

On February 19, 1957, Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, brought an action against Merreta Kersey and Ralph E. Kersey in the district court for Buffalo County for damages resulting from negligence on the part of Merreta Kersey in operating the automobile owned by Ralph E. Kersey resulting in the death of Gregory Beavers, a minor.

It was stipulated by the parties that on August 31, 1956, at the time and place of the accident, Merreta Kersey, daughter of Ralph E. Kersey and Jessie Kersey, was driving the 1952 Oldsmobile, and the following persons were riding in said automobile: James Kersey, Joyce Kersey, and Gregory Beavers.

The record discloses that Ralph E. Kersey is the pastor of the First Christian Church in Elm Creek, and that he lives in Elm Creek, Nebraska. He and his wife, Jessie, have five children, a son Robert Kersey who was home on furlough at the time of the accident, a daughter Erma who lives at Blair, Merreta Kersey who was born March 28, 1941, and Joyce and James Kersey, twins, born December 19, 1948. Reverend Kersey owned a 1952 Oldsmobile sedan and a policy of insurance issued by the plaintiff.

On August 31, 1956, Reverend Kersey went to Lexington to see a doctor. He and his wife left home about 1:30 or 2 p.m., and were driven to Lexington in the automobile of their son Robert. When he left home, Reverend Kersey left his Oldsmobile in the driveway, and inadvertently left the keys in the ignition switch. Normally he did not leave the keys in the car. While Reverend and Mrs. Kersey were at Lexington, Merreta

took the Oldsmobile and went for a drive in the country, taking the twins and Gregory Beavers, a playmate of the twins and the minor son of Dale O. Beavers. On a country road north of Elm Creek the Oldsmobile overturned, seriously injuring the three Kersey children and killing Gregory Beavers. Reverend and Mrs. Kersey heard of the accident when they returned to Elm Creek.

Reverend Kersey testified that prior to August 31, 1956, he had given Merreta lessons in driving the Oldsmobile. He permitted her to drive on country roads, which he referred to as "back roads," when he was with her on visits to members of his congregation. She drove in his presence 10, 12, or maybe 18 times. Reverend Kersey further testified that on July 4, 1956, when he, his wife, Merreta, and the twins were vising in Overton, Merreta asked to drive the Oldsmobile to visit a girl friend a few blocks from where they were visiting. She was granted permission to do so. On another occasion in 1955, while the Kerseys were visiting relatives in Smithfield, Missouri, Merreta was granted permission to drive the car across the village and back.

Reverend Kersey further testified that after hearing about the accident he and Mrs. Kersey went to the hospital where they found Merreta to be seriously injured and unconscious, and the twins were also seriously injured. On the morning after the accident a representative of the plaintiff insurance company contacted Reverend Kersey, as did also Rex Gray, an agent of the plaintiff from whom Reverend Kersey purchased the insurance policy. Reverend Kersey testified that the representative, Frank J. Roubicek, said he was an adjuster for the insurance company. There was a conversation with Gray and the adjuster at that time. Gray said they were sorry that the accident happened, but that there was nothing to worry about so far as the finances were concerned because Reverend Kersey was covered by insurance, and the medical bills would be taken care of.

Reverend Kersey further testified that the adjuster also took part in this conversation. The adjuster then said that they would like to make a report and had to have it in writing. Then Reverend Kersey, Mr. Gray, and the adjuster went out on the veranda on the north side of the hospital and sat down. A statement was taken, which was signed by Reverend Kersey. Reverend Kersey testified that he believed the adjuster called him on the telephone later while he and Mrs. Kersey were eating, and asked if they could have a few minutes of their time. Reverend Kersey told the adjuster that they were greatly disturbed over the accident, and the adjuster said: "Well, we just want to help you with this so you can get your insurance," and then said that they were coming out to the hospital. They went to the hospital with attorney Tye, by permission of Reverend Kersey. At the time they arrived, Reverend Kersey told them that the children were gravely ill and that he and Mrs. Kersey were very tired and wanted to be with the children. Mr. Tye expressed his sympathy with reference to the accident, and stated that he had come to take statements with regard thereto, so that Reverend Kersey could obtain his insurance. A place was found where it was suitable to take the statements of Reverend Kersey and his wife who was present.

Reverend Kersey testified further with reference to his general health, stating that he had had a spinal operation in July 1946 and had been compelled to wear a brace since that time, and that he could not properly relax or sleep; that he was extremely tired and nervous at the time Mr. Tye asked the questions, but that in his profession he encountered death, accidents, and sickness, and through the years he had learned to control his nervousness and could sympathize without showing emotion; and that his wife had been ill with what was known as a "heart block."

Reverend Kersey further testified that approximately

3 weeks after the accident he was notified by the plaintiff insurance company that it was not going to make payment under the provisions of the insurance policy; that plaintiff never notified him that it was not going to defend him in the action now pending, brought by Dale O. Beavers, administrator of the estate of Gregory Beavers; and that he had made no investigation of the accident to protect himself because the plaintiff said it would defend the action.

Merreta Kersey testified that she remembered driving the Oldsmobile on August 31, 1956; that she was at home that day with the twins; that the Oldsmobile was on the driveway; and that she had not asked her parents that day about driving it. She further testified that she took the Oldsmobile and the three children who were seated in the back seat of the car and went for a little ride in the country; that her father had been teaching her to drive the Oldsmobile for over a year; and that the accident occurred on a country road. She testified to driving the Oldsmobile in Overton and in Smithfield, Missouri, in the driveway at home, and on country roads a number of times.

Frank J. Roubicek, a claims service representative of the plaintiff, testified that he became acquainted with Reverend and Mrs. Kersey the morning of September 1, 1956, which was occasioned by a report of the accident of August 31, 1956, he received from Rex Gray, an agent of the plaintiff at Kearney; that he met Reverend Kersey in the hall at the hospital and talked to him briefly; that they then went outside the hospital and found some chairs; and that at that time he informed Reverend Kersey that he was an authorized representative of the plaintiff, and explained to him the purpose of his mission which was to accumulate facts with reference to this particular accident. He asked Reverend Kersey what he knew about the accident, and Reverend Kersey volunteered such information as he had about the accident. He also stated that he had not given

permission to Merreta to drive the car. At that time this witness took a statement in writing from Reverend Kersey. Reverend Kersey read the statement and signed it, using his own pen. This witness further testified that Reverend Kersey was quite composed, as opposed to being distraught, and his conversation was coherent.

Rex Gray testified that when they contacted Reverend Kersey at the hospital he was as near normal as a person could be, and had no difficulty in talking or visiting with them, or in answering questions. During the conversation had with Reverend Kersey in which the written statement was made, Roubicek presented Reverend Kersey a non-waiver agreement with the explanation that it was to enable the plaintiff to continue the investigation, and both Reverend and Mrs. Kersey signed this instrument.

Later the same day, shortly after noon, Mr. Tye asked questions which were answered by Reverend and Mrs. Kersey and recorded by a court reporter. This reporter testified that at the time he recorded the statements, Reverend Kersey answered the questions readily, calmly, and quietly. He further testified that after the statement was taken the court reporter again saw Reverend Kersey in the hospital and remarked to him that he must have very strong faith in his religion to take the tragedy that had happened as well as he did, and Reverend Kersey replied that he had very great faith.

Mr. Tye testified about going to the hospital to take the statements of Reverend and Mrs. Kersey; that he talked to them a few minutes prior to taking the statements and did not notice anything unusual about them or in their way of answering his questions; and that they made no complaints about making the statements.

Mr. Roubicek and Mr. Gray testified that after leaving the hospital they went to Elm Creek and had a conversation with Dale O. Beavers, the father of the boy who was killed. Mr. Beavers testified that in the conversation Mr. Roubicek stated that all expenses would

be paid, including flowers and burial clothes. Mr. Roubicek testified that he told Mr. Beavers the kind of expenses the company paid if the loss was within the coverage, and that he was there to complete the investigation. Mr. Gray testified that Mr. Roubicek made the statement that he was investigating and attempting to determine if the policy was in force.

After a full report was made to the plaintiff, Roubicek, together with Gray, went to the Kersey home about 2 weeks after the accident and advised them that no coverage would be extended. Later the Kerseys employed a law firm, and an attorney of that firm had conversations with Roubicek with reference to the reason for the denial of coverage. The plaintiff wrote a letter setting forth its position in this matter. There was further correspondence with reference to this matter that need not be set out.

On March 23, 1957, an attorney, at the request of Mr. Tye, took a statement which was recorded by a court reporter, in which Reverend Kersey referred to two occasions when he had permitted Merreta to drive the car alone, and in which he recalled that when he gave the statement at the hospital he did not include these facts. These two occasions have heretofore been mentioned.

The statement taken by Roubicek at the hospital, signed by Reverend Kersey, in substance was to the effect that a year or so prior to the accident Reverend Kersey had let Merreta drive the Oldsmobile while he was in it, in order that she might learn to operate it; that prior to August 31, 1956, Merreta had never driven the Oldsmobile without her father being in the car; that when he left to go to Lexington, the car was in the driveway and the keys were in it; that Merreta did not have his permission to drive the Oldsmobile that afternoon; that she had never driven the car alone; that his wife never gave permission to Merreta to drive the

Oldsmobile; and that he had read the page and the statements made therein were true.

In the statement made on Saturday, September 1, 1956, wherein Reverend Kersey was interrogated by attorney Tye, he stated that when he left Elm Creek he inadvertently forgot to take the keys out of the Oldsmobile; that Merreta would occasionally drive with him beside her on a country road and maybe a block or two in the village of Elm Creek and had been doing that for about a year; that he had not permitted her to drive the car unassisted; that he had never let her take the wheel on the highway or even on a country road; that she was never permitted to use the car alone in any way; that it had not been her habit or custom, or the custom of the family to let her use the Oldsmobile; that frequently she would ask to drive the Oldsmobile but that he always answered "no"; that on the day of the accident she did not say anything about driving the automobile, and he had no idea that she would; that she did not have a driver's license or a learner's permit; and that she was about 15½ years of age. The foregoing is the substance of the statement of Reverend Kersey. Mrs. Kersey's testimony was to the same effect with reference to Merreta driving the Oldsmobile.

The policy of insurance involved in this case provides in part: "Coverage C - Medical Payments. To pay reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, dental, ambulance, hospital, professional nursing and funeral services, and prosthetic devices, to or for each person who sustains bodily injury, caused by accident, while in or upon, entering into or alighting from, or through being struck by the automobile, provided the automobile is being used by the named insured or his spouse if a resident of the same household, *or with the permission of either.*" (Emphasis supplied.)

Subsection (3) of section 60-407, R. S. Supp., 1955, provides in part: "Minors who have not attained the

age set forth in subsection (1) of this section but are over the age of fourteen years, except within metropolitan, primary, and first-class cities, may be issued, by the county treasurer, a limited permit to drive a motor vehicle to and from the school building where he attends school, by the nearest highway or street from his place of residence, if such child lives a distance of one and one half miles or more from such school. Such limited permit shall be used for the sole purpose of transporting such minor to attend school; * * *."

Subsection (5) of section 60-407, R. S. Supp., 1955, provides in part: "Any person who shall have attained the age of fifteen and one half years or more may obtain a learner's permit from an examiner which shall be valid for a period of six months and he may operate a motor vehicle over the highways of this state if he is accompanied at all times by a licensed operator who is at least twenty-one years of age and who is actually occupying the seat beside the driver."

There was no compliance with the above section of the statutes as it relates to Merreta Kersey.

"The permission required to bring an additional insured within the protection of an omnibus clause may, as a general proposition, be express or implied, and the omnibus clause may expressly provide, or be required by statute to provide, that the permission of the named insured may be express or implied. Where the word 'permission' or 'consent' appears in the omnibus clause without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured. Implied permission is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used." 5A Am. Jur., Automobile Insurance, § 94, p. 92.

In 6 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3943, p. 614, it is said: "Per-

mission or consent may be implied. Thus permission is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner, which must be regarded as a 'permission' within the policy. But no implication arises from use on a specific occasion for a specific purpose by the insured or one of his household of permission to others to operate the automobile even for a use closely connected and related in purpose and time, and permission to use the automobile for a given purpose does not imply permission to use it for all other purposes."

In Bekaert v. State Farm Mutual Automobile Ins. Co., 230 F. 2d 127, eliminating the factual situation, the court said: "* * * such Nebraska cases as there are in the omnibus-clause field, appear to make the question of permission on the part of the named insured to the use of the automobile by another at the time of an accident one that ordinarily is to be resolved, in its express or implied existence, as a matter of actual and found fact. Cf. Wigington v. Ocean Accident & Guarantee Corp., 120 Neb. 162, 231 N. W. 770; Andrews v. Commercial Casualty Ins. Co., 128 Neb. 496, 259 N. W. 653; Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

"In each of these three cases, as examination will show, the Nebraska Supreme Court primarily engaged in testing the sufficiency of the evidence in the record to sustain the factual appraisal and general finding of permission or lack of permission which the trial court had made." See, also, Beatty v. Hoff, 382 Pa. 173, 114 A. 2d 173, and cases cited therein.

In the case of Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413, it appears that there was an accident allegedly caused by the driver of a truck owned by Paxton-Mitchell Company and causing

personal injuries. Paxton-Mitchell Company appealed and a judgment against it was reversed and the cause dismissed. Thereafter the plaintiff brought an action against the defendant as insurer of Paxton-Mitchell Company. The evidence disclosed that one Gryva was the regularly assigned driver of a particular truck owned by his employer, the Paxton-Mitchell Company. On one working day he was on a mission for the employer, and returned from that trip too late to order one of the hot lunches which the company prepared and provided for its employees. He then drove the truck to a cafe some blocks away for lunch, and had an accident while returning from his lunch. This court held that no permission, express or implied, was shown, and refused to imply permission from the fact that the employee had been allowed to be in charge of the truck and to use it for certain purposes. This court stated the material question to be, "was the 'actual use' of the truck at the time of the accident 'with the permission of the Named Insured,' " and held that it was not.

There is no contention in the instant case relating to express permission given by Reverend Kersey to Merreta Kersey to drive the Oldsmobile. Consequently, the question that arises from the facts is whether or not Merreta Kersey had implied permission to drive and use the Oldsmobile.

It appears from the evidence that there is no basis for the implication of permission for Merreta Kersey to drive the automobile without adult company, without supervision, and without asking whether she might drive the Oldsmobile.

We believe, from the evidence adduced, that the trial court based its decision on ample evidence to show that Merreta Kersey lacked implied permission to drive the Oldsmobile.

In the light of the evidence and the authorities heretofore cited, we conclude that other matters raised by the defendants need not be determined, and that the judg-

ment of the trial court should be and is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE TELEPHONE CHARGES OF THE UNITED TELEPHONE COMPANY OF THE WEST IN THE CITY OF SCOTTSBLUFF, NEBRASKA.

CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLANT, V. UNITED TELEPHONE COMPANY OF THE WEST, A CORPORATION, APPELLEE, NORTHWESTERN BELL TELEPHONE COMPANY ET AL., INTERVENERS-APPELLEES, IMPLEADED WITH STATE OF NEBRASKA, APPELLEE.

106 N. W. 2d 12

Filed November 18, 1960. No. 34792.

1. **Public Service Commissions.** "Rate tariffs and any rules of interpretation thereof" are rules and regulations of general application which deal with and fix schedules and classifications of rates and charges by the Nebraska State Railway Commission, and all such rules and regulations are specifically not included within the provisions of sections 84-901 to 84-908, R. R. S. 1943.
2. ———. The power of the Nebraska State Railway Commission to fix the rates to be charged by common carriers is legislative and not judicial in character.
3. **Telecommunications: Public Service Commissions.** The Nebraska State Railway Commission has the power and authority to legislatively enter an order or orders permitting a telephone company to amend and revise its general rules and regulations and thereby impose pro rata against its subscribers within the territorial limits of a city or village an occupation tax levied by such city or village.
4. **Public Service Commissions.** On appeal from a decision of the Nebraska State Railway Commission involving the rates to be charged by common carriers it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful.
5. ———. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited.
6. **Public Service Commissions: Appeal and Error.** On appeal from

a decision of the Nebraska State Railway Commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.

7. **Public Service Commissions.** Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the Nebraska State Railway Commission and not the courts.

8. ———. Where it is shown that an order of the Nebraska State Railway Commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Loren G. Olsson and *Nelson, Harding & Acklie,* for appellant.

Wright & Simmons and *James R. Hancock,* for appellee United Telephone Co. of the West.

Bert L. Overcash, Edward Sklenicka, and *Gerald J. Hallstead, for* interveners-appellees.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee State of Nebraska.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On September 30, 1959, the City of Scottsbluff, herein called plaintiff, filed a complaint, No. 935, with the Nebraska State Railway Commission, herein called commission, seeking as a municipal corporation and as a subscriber on behalf of all other subscribers within said city, to have set aside and vacated orders of the commission entered January 26, 1959, and April 21, 1959, which authorized United Telephone Company of the

West, herein called defendant, to amend and revise its general rules and regulations applying to telephone service and tariffs and approve same to provide that: "* * * when any city or village served by applicant imposes upon applicant an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed annually pro rata by the Company to the exchange customers receiving service within the territorial limits of such municipal corporation." Only an occupation tax imposed by plaintiff was or is directly involved.

The grounds for plaintiff's complaint were substantially that no notice was given of hearing held by the commission on defendant's applications filed December 30, 1958, and April 10, 1959, of which plaintiff allegedly had no notice or knowledge until April 25, 1959; that the commission was without jurisdiction to enter its orders of January 26, 1959, and April 21, 1959; that such orders were void and defendant was without authority to so bill the occupation tax to its subscribers within the territorial limits of plaintiff city or charge them in excess of the rates theretofore fixed by the commission on August 8, 1958; and that such pro rata charge to subscribers resulted in an unreasonable service rate and a rate unjustly discriminatory against subscribers located within plaintiff city.

Notice of hearing on plaintiff's complaint having been given, defendant filed a voluminous answer on October 14, 1959, traversing generally the material allegations of plaintiff's complaint and denying that plaintiff had such an interest as would give it a right to maintain the action. Certain admissions were made in defendant's answer which need no recitation at this point in the opinion.

On October 19, 1959, the Nebraska Telephone Association filed an application for leave to intervene, together with a showing in support thereof, for the purpose of opposing plaintiff's complaint. A hearing was held by the commission on the issues thus joined on

October 26, 1959, and November 5, 1959, whereat counsel for the city of Crete appeared as intervener in oral support of plaintiff's complaint. Counsel for Northwestern Bell Telephone Company also appeared as intervener in oral opposition to plaintiff's complaint, and an assistant attorney general appeared only in an advisory capacity for the commission.

Thereafter, the commission entered an opinion, findings, and order dismissing plaintiff's complaint and thereafter overruled plaintiff's motion for rehearing. Therefrom plaintiff appealed to this court, assigning substantially that: (1) The commission erred in dismissing plaintiff's complaint and overruling its motion for rehearing; (2) that the commission's orders entered January 26, 1959, and April 21, 1959, were void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943; and (3) that the decision of the commission was contrary to the evidence and law. We do not sustain the assignments.

The material facts involved are not in dispute, and the questions presented by the pleadings and evidence are: (1) Did the plaintiff as a municipal corporation and a subscriber of telephone service from defendant and on behalf of all other such subscribers within the limits of the city have a right to maintain the action; (2) were the orders here involved rules and regulations within the provisions of sections 84-901 to 84-908, R. R. S. 1943; (3) did the commission have the power and authority to enter an order or orders permitting defendant to amend and revise its general rules and regulations and thereby impose pro rata against its subscribers within plaintiff city an occupation tax levied by it; and (4) were such orders unreasonable and arbitrary or discriminatory.

Plaintiff is a municipal corporation organized under the laws of Nebraska and a city of the first class, having a population of about 14,000. Defendant has a franchise from the city which did not require payment of any

franchise fee. On May 1, 1959, defendant's main office was located in plaintiff city and there were 4,438 telephone stations of defendant located within the city, not including stations subscribed by the United States, the state, and agencies or political subdivisions of either. Also, on May 1, 1959, defendant owned and maintained local service exchanges in the cities or villages of Scottsbluff, Gering, Bayard, Mitchell, Morrill, Lyman, Minatare, Broadwater, Oshkosh, Lewellen, and Chappell, in Nebraska, and in addition thereto owned and maintained telephone stations located within rural areas in Scotts Bluff, Banner, Morrill, Garden, Deuel, and Sioux counties. The total number of telephone stations served by defendant in Nebraska on May 1, 1959, including those within plaintiff city but not including stations subscribed by the United States, the state, or agencies or political subdivisions thereof, was 11,399.

On April 21, 1958, defendant filed an application, No. 21298, with the commission, seeking authority to increase rates and charges for telephone service furnished by it within Nebraska. On August 6, 1958, after a hearing whereat plaintiff city participated as a protestant, an order was entered by the commission which granted such application, in part overruled objections thereto, and ordered defendant to submit for the commission's approval a schedule of rates and charges for telephone service in Nebraska that would produce the additional revenue allowed.

On August 8, 1958, in application No. 21298, the commission approved defendant's attached schedule of increased intrastate rates and classification of exchanges, and authorized defendant to charge for and collect such schedule of rates effective as of August 11, 1958. Such orders became final without appeal therefrom.

On December 30, 1958, defendant filed an application, No. 21629, with the commission, referring therein to its application, No. 21298, and the commission's order of August 8, 1958, authorizing defendant's schedule of rates

and charges, and proposing "to revise its general rules and regulations to provide that when a city or village of a rate group imposes upon the telephone company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed pro rata to the exchange customers receiving service within the territorial limits of such municipal corporation, annually." Defendant's prayer was all inclusive and for exactly that relief, with no exception for any such subscribers.

Thereafter, on January 6, 1959, a letter from the commission addressed: "TO ALL PERSONS INTERESTED:" was received by plaintiff city, directing its attention to an attached letter dated December 23, 1958, which pertained "to occupation tax levied against telephone companies operating in the State of Nebraska." Such attached letter, signed by an assistant attorney general and received by the commission, said in part: "It appears that the city of Scottsbluff has imposed an occupation tax on this company, which in turn has asked permission of the Commission to pass the tax on to only the telephone subscribers located in the city of Scottsbluff, in the form of increased rates." The substance of the opinion so given by the assistant attorney general in his letter of December 23, 1958, was that the occupation tax was "only another general expense and in the same category as other taxes and it can be considered only as a part of the general structure used to determine a fair rate of return and that the impact of such tax cannot be shifted to any particular locality." Such conclusion was reached by analogy without citing any authority.

On January 26, 1959, a letter from the commission addressed: "TO ALL PERSONS INTERESTED:" was received by plaintiff city. It called attention to the commission's letter of January 6, 1959, and the letter of December 23, 1958, attached thereto, then pointed out that on January 13, 1959, the commission had received another letter from the assistant attorney general which

stated that the letter of December 23, 1958, was erroneous and that his attached letter of January 13, 1959, was to correct that error. Such letter cited many authorities, and concluded that: "The authorities hold generally that it is proper, where an occupation tax or license is levied by municipalities, to pro rate such tax or fee among the subscribers in the municipality which imposes such taxes or fees. The decisions are based on the principle that if such items of expense are assessed to all the subscribers, those who live outside the territorial limits of the municipality imposing the tax pay a share of the tax of those who receive the benefit of the tax imposed and that this results in discrimination against the nonresident subscribers."

In the meantime, on January 26, 1959, plaintiff enacted an ordinance imposing an occupation tax of $3,600 upon telephone companies maintaining an office and doing an intrastate business within the limits of the city on May 1 of any year, which tax was due and payable in advance on May 1 of each year. Also, on January 26, 1959, and evidently prior to enactment of the aforesaid ordinance, the commission, without further notice to plaintiff, granted defendant's application No. 21629 theretofore filed by it December 30, 1958. It did so: "Upon consideration of the application and attending circumstances, and being fully advised, the Commission is of the opinion and finds that the application is fair and reasonable, is in the public interest and should be granted." The order of the commission was that defendant "be and it is hereby authorized to revise its general rules and regulations applying to telephone service as set forth in the opinion and findings and by this reference made a part hereof," to wit "to provide that when a city or village imposes upon the telephone company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed prorata to the exchange customers receiving service within the territorial limits of such municipal corpora-

tion." This conformed to defendant's application No. 21629.

Also, on April 10, 1959, defendant filed application No. 21737 with the commission seeking approval of its "General Rules and Regulations applying to telephone service," a copy of which was attached to defendant's application. In that connection, without further notice to plaintiff city, an opinion, findings, and order were entered by the commission on April 21, 1959, finding that defendant's general rules and regulations were "in substance a recodification of the General Rules and Regulations applying to telephone service of applicant, now on file with the Commission and heretofore approved by it although not issued all in one instrument, together with a provision made in the General Rules and Regulations in compliance with the order of this Commission on January 26, 1959, in application No. 21629." The order of April 21, 1959, authorized defendant "to issue General Rules and Regulations applying to telephone service, a copy of which is attached to the application." As far as important here, such rules and regulations provided that: "When any city or village imposes upon the Telephone Company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall, insofar as practicable, be billed prorata to the exchange customers receiving service within the territorial limits of such municipal corporation."

Thereafter, on April 27, 1959, the occupation tax of $3,600 imposed upon defendant by plaintiff, commencing May 1, 1959, was paid to the city by defendant and same was accepted by plaintiff. Upon billing subscribers for services beginning in the month of May, defendant added 80 cents to the statements of each of the 4,438 subscribers using telephone service within the city, which sum was separately designated as the subscriber's pro rata share of the occupation tax for 1959 assessed to defendant telephone company.

True, such charge was not billed by defendant to plaintiff city as a subscriber for its telephone services, but it will be noted that defendant's applications, Nos. 21629 and 21737, the orders of the commission in response thereto, and defendant's general rules and regulations duly filed with and approved by the commission, covered all "exchange customers receiving service within the territorial limits of such municipal corporation," which included plaintiff as a subscriber therein. Whether plaintiff was billed as a subscriber or not is of little importance here. It may have been good business policy for the company not to bill the city as a subscriber but the controlling question is not what was done but what could have been done under the authority sought by defendant and granted by the commission. In other words, the city was a subscriber having the same interest as any other subscriber who had a right to maintain this action. Whether the commission could have excepted the city as a subscriber is not an issue here. The fact is that it did not do so and that defendant did not even request it. Contrary to defendant's contention, the opinion in In re Application of Nebraska Power Co., 147 Neb. 324, 23 N. W. 2d 312, does not foreclose plaintiff's right to maintain this action and appeal to this court. In that connection, section 75-401, R. R. S. 1943, specifically provides in part that: "When any * * * person in his own behalf or in behalf of any class of persons similarly situated, * * * or any body politic or municipal organization, shall make complaint to the State Railway Commission that any rate or rates fixed by the commission in the schedule mentioned in section 75-302, or in any subsequent revised or modified schedule, * * * is unreasonably high or low, unjust or discriminating, the commission shall immediately fix a day for hearing the same, and shall cause notice thereof containing the substance of the complaint to be served upon the railroad company, common carrier, or other person or persons hereinbefore named complaining, and

the railway company or common carrier complained of, and the day and date upon which hearing will be had upon the complaint; * * *."

Also, section 75-405, R. R. S. 1943, provides that any person who shall be dissatisfied with the decision of the Nebraska State Railway Commission affirming, revising, annulling, or modifying any rate or rates complained of in the original schedule or any subsequent schedule, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by the commission, may institute proceedings in this court to reverse, vacate, or modify the order complained of, if such person has been affected by the decision of the commission.

We turn then to the question whether orders of the commission here involved were void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943, which allegedly required publication of notice and a public hearing on defendant's application, and that in any event the rules adopted or amended would be invalid and ineffective unless approved by the Attorney General and filed with the Secretary of State, which admittedly was not done. In that connection, plaintiff relies upon Mogis v. Lyman-Richey Sand & Gravel Corp., 90 F. Supp. 251, which was affirmed in 189 F. 2d 130 by the United States Court of Appeals. Those opinions involved a controversy which arose and was instituted under the aforesaid statutes as they existed prior to the time section 84-901, R. R. S. 1943, was amended by Laws of Nebraska, 1951, Chapter 342, section 1, page 1128, known as L. B. 241, which was evidently done for the purpose of making such decisions no longer controlling. See, Statement of Government Committee, In re L. B. 241, dated March 7, 1951.

As so amended, section 84-901, R. R. S. 1943, effective August 27, 1951, provided in part: "(2) 'rule' means the written statement of any rule, regulation, standard or policy of general application issued by an agency,

including the amendment or repeal thereof, and designed to implement, interpret, or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests, *and not including rate tariffs, and any rules of interpretation thereof; * * *.*" (Italics supplied.) The italicized language aforesaid was the amendment added to the act in 1951. The aforesaid section was again amended in 1959, effective September 28, 1959, to make crystal clear what the Legislature intended by the 1951 amendment. See § 84-901, R. S. Supp., 1959. As amended in 1951, "rate tariffs, and any rules of interpretation thereof" are rules and regulations of general application which deal with and fix schedules and classifications of rates and charges. See, Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F. 2d 130; Union Wire Rope Corp. v. Atchison, T. & S. F. Ry. Co., 66 F. 2d 965.

Contrary to plaintiff's contention, we find no legal distinction between rate tariffs and rate orders. Such rules and regulations and any rules of interpretation thereof are not included in section 84-901, R. R. S. 1943. Also, contrary to plaintiff's contention, sections 84-907 and 84-908, R. R. S. 1943, enacted in 1953, and effective March 24, 1953, which are in pari materia with section 84-901, R. R. S. 1943, and deal with rules adopted, amended, or repealed by any state agency, likewise do not include or have application to "rate tariffs, and any rules of interpretation thereof" by the commission, which are clearly excepted and not included in said sections.

In Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331, we reaffirmed that: "The power of the State Railway Commission to fix the rates to be charged by common carriers is legislative and not judicial in character."

Plaintiff not only had notice of defendant's pending application but it also enacted an occupation tax on the

same day after defendant's application had been granted. Thereafter, plaintiff accepted payment of the occupation tax from defendant on April 27, 1959, and, with plaintiff's knowledge, defendant billed subscribers within the city pro rata therefor from May 1959, until September 30, 1959, before plaintiff instituted this action, although plaintiff admittedly knew on April 25, 1959, that such billing had been authorized by the commission and would be made. Be that as it may, we conclude, under the circumstances presented herein, that no notice to plaintiff was required to be given by the commission before it acted legislatively in permitting defendant to revise and amend its rate rules and regulations to permit it to collect pro rata from its subscribers within the city the occupation tax imposed by the city unless a statute specifically required notice. We have not been cited and we have not found such an applicable and controlling statute in situations comparable with that at bar.

As far as important here, section 75-201, R. R. S. 1943, provides in part: "The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general control over, all * * * telephone * * * companies, and any other carrier engaged in the * * * transmission of messages for hire." See, also, § 75-245, R. R. S. 1943; Art. IV, § 20, Constitution of Nebraska. As we view it, such cited and quoted sections and sections 75-302, 75-401, 75-402, 75-403, 75-404, and 75-405, R. R. S. 1943, have application and are controlling here. Thereby, plaintiff and other subscribers and common carriers as well were timely given ample notice and just protection of all their rights. As a matter of fact, the pleadings filed in this action were amply sufficient to bring the issues and procedure squarely within such provisions.

Finally, we turn to the issue of whether the commission had the power to enter orders as such permitting defendant to amend and revise its rules and

regulations and thereby pass the occupation tax imposed by plaintiff on to its subscribers within the city pro rata and whether such orders were unreasonable or were discriminatory in the light of section 75-501, R. R. S. 1943.

With regard to the question of the commission's power to render such orders, plaintiff cites and relies upon State ex rel. City of St. Louis v. Public Service Commission, 362 Mo. 977, 245 S. W. 2d 851, 93 P. U. R. N. S. 454, in support of its contention that such power did not exist. Plaintiff admits that such Missouri opinion was subsequently overruled in State ex rel. City of West Plains v. Public Service Commission (Mo.), 310 S. W. 2d 925, 23 P. U. R. 3d 164. However, plaintiff argues that we should follow a dissenting opinion filed therein which we do not find supported by any other authority. In that majority opinion, the Missouri court said: "We are of the view, therefore, that the commission, as a part of its power and duty to establish reasonable rates which would produce a fair return, could lawfully provide for and prescribe the reguations and practices to be indulged by the utility to produce the desired result, including the power to permit Western to file a general rule with its rate schedule authorizing that utility to pass on license and occupation taxes to certain subscribers." No authority cited or found holds otherwise. Such conclusions are ably supported by authorities from other jurisdictions.

In City of Newport News v. The Chesapeake & Potomac Telephone Company of Virginia, 198 Va. 645, 96 S. E. 2d 145, 17 P. U. R. 3d 284, the court said: "The power of the Commission to enter an order of the kind involved on this appeal seems clear. * * * The Commission stated in the conclusion of its opinion that the charges authorized by its order to be added to the bills of the company's local customers 'place the added burden on those who should bear it and prevent each locality from upsetting the state-wide system of rate-making

for its own advantage and to the disadvantage of consumers living outside the taxing locality.' It is within the constitutional and statutory powers of the Commission to accomplish that result."

In State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service, 19 Wash. 2d 200, 142 P. 2d 498, 52 P. U. R. N. S. 6, as interpreted and clarified by State ex rel. City of Seattle v. Department of Public Utilities, 33 Wash. 2d 896, 207 P. 2d 712, the Washington Supreme Court in this particular opinion was reviewing and upholding the opinion and order of the Department of Public Service, which appears in 37 P. U. R. N. S. at page 321, as follows: "By Advice No. 392, filed June 22, 1938, the company sought to pass on to its subscribers municipal occupational license taxes within seven cities which now levy such taxes. * * *

"The company maintains that the failure to pass on this tax pro rata to the subscribers in the cities in which it is levied, inevitably creates a situation prejudicial and unjustly discriminatory in respect to subscribers in areas in which no such taxes are levied.

"It would be manifestly unfair to impose upon the many thousands of telephone subscribers in this state, who live elsewhere than in the seven cities in which such taxes are now levied, the burden of providing the dollars necessary to pay occupation taxes in those cities. (It is no answer to say that the company should itself pay this tax, for the company must necessarily pay it out of dollars received from its subscribers. In our opinion, it is much more equitable to provide that the subscribers in the various cities should assume that responsibility, if such cities have used that method of providing additional tax revenue, than to require subscribers throughout the state to help carry the cost of paying the taxes exacted by these particular cities. There can be no doubt that an unjust and unreasonably discriminatory situation now exists in respect to these particular taxes, and that this burden must be

placed where it should be, namely, upon the subscribers in the particular localities in which the taxes are levied.)

"Two methods have been suggested for accomplishing this end, one being to fix special exchange rates in the several localities in question sufficient to allow for these taxes under operating expenses, and the other to allow the pro rata passing on of the tax itself to the subscribers in the taxing localities, as proposed by the company.

"The second suggestion is more equitable. It has the advantage of immediately imposing upon ratepayers in any community which elects to derive revenue from such a tax, the burden of providing those dollars. Conversely, whenever any such tax is repealed by any of the levying cities, the subscribers in question will be relieved automatically and concurrently of the burden which has been imposed upon them by their own municipalities.

"An additional reason for this conclusion is that if we countenance the recurrent imposition of similar taxes by the host of municipalities in this state upon the various utilities subject to our jurisdiction, the inevitable result will be, as in this case, continually mounting operating expenses over which we can exercise no control. This may well lead to a procession of rate cases requiring the expenditure of much time and expense both by the utilities and by the Department.

"We, therefore, direct the company to pass on municipal occupation taxes."

In that connection, we point out that the opinion, findings, and decision of the commission in the case at bar contain an almost verbatim adoption of the above quotation about which the opinion of the Supreme Court of Washington said: "We are convinced that the Department, insofar as such taxes are concerned, has the power to fix special exchange rates applicable to the different communities, which will in

effect require the ratepayers in each community to absorb a sum equal to the amount of the tax which respondent is required to pay to that municipality. More than this, the Department cannot do." State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service, *supra.*

Also, in a second opinion, in that case, wherein the cities again appealed, contending that the lower court had misconstrued the Supreme Court's opinion, the Washington Supreme Court said: "The questions were all considered by the superior court when it reviewed the department's order. This court in its opinion examined the questions relating to all the taxes. The superior court entered its judgment on the remittitur, and included therein the following:

" 'The Department may order the Relator to pass on to the subscribers in any municipality any * * * occupation taxes * * *.'

"When this court denied the petition for recall of remittitur and correction of the judgment, it in effect approved the judgment entered by the superior court." State ex rel. City of Seattle v. Department of Public Utilities, *supra.*

In City of Elmhurst v. Western United Gas & Electric Co., 363 Ill. 144, 1 N. E. 2d 489, the court said: "The discrimination forbidden by paragraph 53 (sec. 38) is as to rates between customers of the same class in the territory. Customers residing in subdivisions of the same territory served by the public utility where an annual percentage of its gross receipts is exacted from the public utility, are not in the same class as those patrons who live in a municipality where such percentage is not exacted. * * * It would be unjust to spread the burden of this annual franchise payment over the whole northern division. It should be borne by the company's consumers residing within the city as that city alone receives the advantage of such annual payment. So, also, it is immaterial in what form the pro rata share

of the consumers' payment of the annual payment be made to the city. There is no statute in this State prescribing the method of allocating such item and it may properly be written on the consumer's statement as three percent." The statute referred to therein is comparable with section 75-501, R. R. S. 1943. See, also, Ogden City v. Public Service Commission, 123 Utah 437, 260 P. 2d 751, 2 P. U. R. 3d 521; Ogden City v. Public Service Commission, 123 Utah 443, 260 P. 2d 754, 2 P. U. R. 3d 525.

Other authorities from utility commissions in Alabama, Arkansas, California, Colorado, Idaho, Kansas, Missouri, West Virginia, and Wyoming, too numerous to cite here, uphold the power and authority of the commission to pass such character of taxes on to subscribers within the limitations of the city pro rata and that such orders are not discriminatory or unreasonable.

In Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra,* we held that: "On appeal from a decision of the State Railway Commission involving the rates to be charged by common carriers it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful.

"Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited.

"On appeal from a decision of the State Railway Commission the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.

"Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the commission and not the courts.

"Where it is shown that an order of the State Rail-

way Commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission."

In the light of the evidence which will not support a finding that the commission's orders here involved were arbitrary and unreasonable, and in the light of the aforesaid authorities, we conclude that plaintiff as a subscriber had a right to maintain the action at bar before the commission and appeal to this court; that the orders of the commission entered January 26, 1959, and April 21, 1959, were not void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943; that the commission had legislative power and authority to render the orders involved; that plaintiff and other subscribers and common carriers as well were given ample notice and just protection of all their rights by statutes heretofore cited; and that the commission's orders were not discriminatory, unreasonable, or arbitrary. For reasons heretofore stated, the decision of the commission dismissing plaintiff's complaint should be and hereby is affirmed.

AFFIRMED.

CHARLES HILFERTY ET AL., APPELLANTS, V. RAY MICKELS, APPELLEE.
106 N. W. 2d 40

Filed November 18, 1960. No. 34840.

1. **Automobiles: Negligence.** The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or if it is greater than is reasonable and prudent under the existing circumstances.
2. ———: ———. A charge of speed of an automobile as negligence may, as any other specification of negligence, be found to exist from circumstantial evidence if it indicates with reasonable certainty the truth of the charge.

3. **Evidence.** Circumstantial evidence concerning an accident may be sufficient to overcome direct evidence as to the speed of an automobile involved therein.
4. **Automobiles: Negligence.** The observance of a practice or custom which is contrary to a statute on the subject does not prevent a motorist from being guilty of a violation of the statute.
5. **Automobiles: Highways.** A motorist entering a public highway from a private driveway on the east and turning north in the east lane thereof is not required to yield the right-of-way to the east half of the highway to an automobile which is being operated in the center of the highway in a southerly direction. The driver of the latter automobile is only entitled to the right-of-way of the west half of the highway.
6. ———: ———. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel.
7. ———: ———. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, as the law prescribes, who is given the right-of-way by section 39-752, R. R. S. 1943.
8. ———: ———. The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances.
9. ———: ———. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance.

APPEAL from the district court for Perkins County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded.*

McGinley, Lane, Shanahan & McGinley, for appellants.

George B. Hastings and *Frederick W. Wanek,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an appeal from a judgment for property damage rendered against Charles Hilferty in favor of ap-

pellee on his counterclaim for damages caused, as he claimed, by a collision of the automobile negligently operated by Charles Hilferty with an automobile operated by appellee and from an order of the district court overruling the motion of appellants for a new trial.

The substance of the petition of appellants to the extent it is required to be recited herein was as follows: Appellants owned a Dodge sedan automobile, hereafter designated the Dodge, which was operated by Charles Hilferty in the forenoon on or about February 1, 1959, on a north-and-south county highway about 3.5 miles east and 6.2 miles south of Madrid. He entered upon the county highway to travel towards the north at which time he saw appellee approaching in a Ford sedan automobile, hereafter designated the Ford, on the left or east side of the highway moving towards the south at a high and excessive rate of speed, considering the condition of the highway. Appellee did not have the Ford under control and he caused or permitted it to collide with the Dodge which had been stopped in the east lane of the highway. The Dodge was damaged by the collision caused by the negligence of appellee specified in the petition as follows: Operating the Ford on the left side of the center of the highway at an excessive speed, considering the condition of the highway and the traffic thereon; failing to respect the right-of-way of appellant to be and travel upon the right or east side of the highway; failing to maintain a proper lookout for other vehicles on the highway; and failing to have and keep the Ford under control so as to avoid a collision with the Dodge which was in plain sight and properly upon the east lane of the highway. Appellants asked judgment for $460.75 against appellee.

Appellee by answer in substance admitted the operation and the collision of the Dodge and the Ford at the time alleged in the petition; denied all other claims made therein; and pleaded contributory negligence more than slight of Charles Hilferty, hereafter referred to

as appellant, as the cause of the collision. Appellee interposed a cross-petition in which he by reference incorporated the contents of his answer as part of it and in substance further stated therein the following: Appellee before the collision of the Dodge and the Ford was operating the latter on the county highway towards the south in a prudent manner at a lawful speed in view of the condition of the highway, and when he was about 200 feet north of the place where the county road and a private farm lane extending from the east intersected the county highway appellee saw the Dodge proceeding towards it from the east about 15 feet from the county highway. An earlier view of the Dodge traveling on the private road was prevented by continuous trees which extended north from it on the east of the county highway for a distance of approximately 200 feet. Appellant did not stop before proceeding from the private lane onto and upon the county highway but in violation of the requirement of the law in that respect entered upon the county highway and commenced a turn to the north or right and proceeded in such a manner that he reached and traveled on the west side of the county highway which was then occupied and used by appellee as he traveled thereon towards the south. Appellee applied the brakes of the Ford but was unable to avoid a collision with the Dodge. Appellant negligently drove the Dodge into and against the Ford causing damage to it. The cause of the collision was the negligence of appellant which was specified in substance as follows: Failure to keep a reasonable lookout for vehicles traveling on the frequently used county highway of which appellant had knowledge; failure to have the Dodge under control so that he could have stopped it at the intersection of the private road with the county highway and thereby have yielded the right-of-way as required by section 39-752, R. R. S. 1943; failure of appellant to prevent the Dodge from going upon the west part of the county

highway in the path of the Ford which was then rightfully occupied and used by the Ford and which was in plain sight of appellant; failure of appellant to stop the Dodge before entering upon the county highway from the private lane and thereby have avoided a collision by it with the Ford which was traveling on the county highway in plain view of appellant; failure of appellant to look to the north before driving the Dodge upon the county highway or a failure, if he did look to the north, to see the Ford on the highway moving to the south in close proximity to appellant; and failure of appellant to operate the Dodge before and at the time of the collision in a careful and reasonable manner so as not to endanger or injure appellee. The Ford was because of the negligence of appellant damaged in the sum of $375.62 for which appellee asked judgment.

A jury trial of the issues of the case was waived and the parties by stipulation consented to a trial thereof by the court without the presence or participation of a jury. The district court found generally against appellant and in favor of appellee and that the cause of the collision and damage sustained by appellee was the negligence of appellant in entering the county highway from the private lane without yielding the right-of-way to appellee. A judgment was rendered for appellee against appellant for $375.62, interest, and costs.

This is an action at law tried and determined by the district court by stipulation of the parties without the presence or participation of a jury. Its findings have the effect of a verdict of a jury and may not be disturbed unless they are clearly wrong. This court may not resolve conflicts in or weigh evidence in such a case. In reviewing the judgment rendered this court will conclusively presume that controverted facts were decided by the trial court in favor of the successful party and its conclusion will not be set aside unless it is clearly wrong. In considering it, if the evidence sustains the findings and judgment in such a case tried

without a jury, the evidence will be considered most favorably to the successful litigant and the benefit of reasonable inferences deducible therefrom will be accorded him. This court in reviewing and deciding an appeal in such a case will regard as established every fact favorable to the successful party which the evidence proves or tends to establish. Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532; Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

It is in observance of these requirements that the evidence is summarized: Appellee at about 9:30 o'clock on the morning of February 1, 1959, accompanied by his wife, left their home about 10½ miles from the place where the accident involved in this case occurred. They were commencing an intended trip to Stratton. They traveled south in the Ford operated by appellee on a county highway which extended north and south, the traveled portion of which was about 18 feet wide. It was a nice, clear day. The trip from their home to near the place of the collision was without unusual incident and during that time the speed of the Ford was about 45 or 50 miles per hour and not more than the latter. The speedometer 1 mile north of where the accident happened showed its speed was 48 or 49 miles per hour. It was about 10½ miles between the home of appellee and the John Hilferty farm which was on the east side of the county highway on which appellee was traveling that morning. The collision happened at 10:10 a. m. The continuous driving time of appellee in going the 10½ miles from his home to the place of the accident was about 40 minutes. On the John Hilferty farm there was a private lane which extended from the east to the west and joined the county highway on the east. The private lane was about 16 feet wide until it approached the county highway and then it fanned out to the north and south until it was about 30 feet where it came to the east side of the county highway. On the north of the private lane extending east

from the east side of the county highway for about 400 feet were trees. Likewise from the north side of the private lane north along the east side of the county highway were trees for a distance of at least 300 feet. The trees were continuous and obstructed vision of the private lane or a vehicle thereon from a traveler on the county highway moving towards the south until he was at or past the trees along the east side of the highway. The surface of the county highway was spoken of as graveled. However, a state patrolman testified the road was supposed to be graveled but he could not detect any gravel on it and he classed it as dirt. Another witness described it as a good country road, portions of which had been graded and parts of which had not been graded. The surface of the highway west of the trees along the east of it was on the day of the accident covered with ice with a light snow on the ice and frost on the snow. The surface of the highway at that area was very slippery where the traffic had traveled on it.

When appellee was an estimated 200 feet north of the north part of the trees which were east of the highway he noticed ice thereon about opposite where the trees commenced. This condition continued to the south for about 300 feet. He removed his foot from the accelerator of the Ford and permitted it to coast. Its rate of speed decreased when it reached the location in the road where the ice and snow commenced until its speed was between 35 and 40 miles per hour. When appellee was about 200 feet north of the private lane he saw for the first time an automobile operated on it towards the west approaching the county highway and he then applied the brakes on the Ford. He watched the automobile on the private lane, which was the Dodge, and he noticed that it was not stopping. It was moving about 10 miles per hour and he could not see that its speed had decreased from what it was when he first saw it. Appellee as he traveled south on the ice and

snow on the highway followed the tracks thereon that had been made by previous traffic which were about in the center of the traveled portion of the highway and he continued to travel in that position until the collision. There is no evidence that there was any traffic on the highway that morning as appellee traveled south. The highway was straight and level and there was no obstruction to view of the highway to the north of the private lane for at least a half mile or of the highway to the south from the private lane for at least 60 or 70 rods. When appellee saw that appellant was going to enter the highway without stopping the Dodge, appellee severely applied the brakes on the Ford and did all he could to drive it to the right or the west part of the highway. He was not successful because of its condition.

Appellant did not stop the Dodge before he entered the highway but drove it at a speed of about 10 miles per hour on and from the private lane to and upon the highway and was attempting to make a turn to the north which was not completed when the Dodge and the Ford collided. The impact of the cars was on their respective left fronts. Probably 150 feet from where the automobiles came in contact appellee applied the brakes on the Ford severely. They were in proper condition but they were ineffective because of the condition of the surface of the highway except the speed of the Ford was somewhat decreased. At the time appellee was attempting to drive the Ford to the west part of the highway and at the time of the impact of the automobiles the speed of the Ford was not more than 15 miles per hour. Appellee testified that the Dodge had not completed the turn to the north, that the left side of it was in the west lane of the highway at least 8 inches, and that is where it was struck. A witness produced by appellee testified that the Dodge was not entirely in the east lane of the highway as it attempted to make the turn to the north. The front

wheels of the Dodge were turned to the right as they would have been in making a turn of it to the north at the time of the collision and the left front wheel was firmly held in that position by part of the Dodge which was forced against it by the impact. The wheel could not be moved until the part that was bearing on it was taken off by considerable mechanical force. The Ford stopped in the highway at the time of the impact. There were 4 feet 4 inches between the automobiles when they came to rest after the collision. The Dodge at the time of the collision was in front or opposite the west end of the private lane. Appellant when he was on the north half of the private lane where it fans out on its north side as it approaches the county highway, first saw appellee 700 or 800 feet to the north coming towards appellant in the middle or on the east side of the highway, traveling at a speed of 70 or 75 miles per hour. He later said when he first saw appellee he was about 600 or 700 feet but not less than 600 feet away and that he traveled at least a quarter of a mile while appellant traveled 30 feet.

Appellee marked on a photograph taken soon after the collision before there had been any change in the situation the location on the highway of the Ford as it traveled south to the place of the collision and this shows that it traveled in about the center of the highway.

A member of the State Highway Patrol who was at the scene of the accident before the automobiles concerned in it had been moved or any other change made, said there were skid marks on the highway north from the Ford for 173 feet; that the left wheel marks of the Ford were 6½ feet from the east shoulder of the highway and the right wheel marks of the Ford were 6 feet from the west shoulder of the highway; that these measurements were made from the outer edges of the part of the highway that was used for traffic and the width of this part of the highway was 18 feet; that the distance

from the left front of the Dodge to the edge of the west shoulder of the highway was 10 feet; that the distance from the midsection of the right side of the Dodge to the edge of the east shoulder of the highway was 2½ feet; that it was 8⅓ feet from the east edge of the highway to the center of the debris which the witness found on the highway near where the automobiles came to rest after the collision; and that the impact of the automobiles was not a full head-on collision but was what the patrolman called a semi head-on in which one vehicle strikes a part of the front of another vehicle. The area of the impact of the front of the automobiles in this instance was quite limited and involved about 18 inches of the width of the front of them.

A witness said he saw the Ford about 400 feet north of the place of the collision traveling south in the center of the highway; that as it approached the Dodge the brakes of the Ford were applied and the back of it swerved and it slid into the Dodge; and that more than half of the width of the Ford when it collided with the Dodge was on the east side of the highway in the east lane.

Appellee was about 200 feet north of the commencement of the icy condition of the surface of the highway when he saw and recognized this hazard to safe passage over it. He had been proceeding at a speed of 45 or 50 miles per hour and he released the accelerator on his Ford and let it coast so that when it reached the commencement of the slippery part of the highway the speed of the Ford was decreased to 35 or 40 miles per hour. The road condition was so hazardous that appellee deemed it prudent to utilize the tracks other traffic had made along either side of the center of the usable part of the highway which was 18 feet wide. This appellee did and he was in that position with the Ford traveling on the center part of the road for about 300 feet until the collision happened. When appellee was about 200 feet north of the private lane he saw the

Dodge approaching the highway and he lightly applied the brakes on the Ford by pumping them. He estimated that when he was 100 or 150 feet from the private driveway he was convinced that the Dodge was not going to stop before it entered thereon and then for the first time appellee forcibly and severely applied the brakes on the Ford. The record does not state the speed of it at that time but it does indicate that the estimate of distance made by appellee was incorrect because the wheel or tire skid marks made by the Ford from the north to the rear wheels of it when it came to rest at the time of the impact were 173 feet in length. During that distance the brakes were applied sufficiently to stop the wheels rotating so that they skidded on the surface. Appellee said he was then unsuccessfully attempting to drive the Ford to the west side of the highway because the brakes were ineffective to stop or to help control the Ford on account of the slippery condition of the surface but the speed of the Ford was reduced some, how much was not estimated.

The speed of the Ford was not at any time in excess of the prima facie limits allowed by the statute. § 39-7,108, R. R. S. 1943. However, that statute contains other specifications for prudent and reasonable speed of motor vehicles in the language of the following parts of it: "* * * The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed * * * when special hazards exist * * * by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care * * *." Lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.

What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or is greater than is reasonable and prudent under the existing conditions. Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20.

The existing conditions of which appellee had knowledge were such that the speed of the Ford prevented its brakes from performing the purpose for which they were furnished as a necessary equipment of the vehicle. The speed of it was sufficient to prevent control of or the turning or driving of the Ford in such a manner as to avoid a collision with the Dodge although the distance between the automobiles when the necessity therefor was known was at least 200 feet. The speed was such that the driver of the automobile, of more than 40 years' experience, could not or did not stop it. It could not be controlled or diverted to some other position on the highway in the distance above stated. It is the duty of all persons in the operation of an automobile to use due or reasonable care to prevent accident or injury. The user of a highway is required to use reasonable care, considering the existing conditions and circumstances. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or he is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach, and is bound to take notice of the road,

to observe conditions along the highway, and to know what is in front of him for a reasonable distance. Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. The existence of negligence is a question of fact and may be found from circumstantial evidence and physical facts if they indicate with reasonable certainty the negligence charged. This is true as to a charge of speed as well as any other specification of negligence. Circumstances or physical facts or both concerning an accident may be sufficient to overcome direct evidence as to the speed of an automobile involved therein. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758. The speed or control of the Ford as shown by the circumstances of this case was neither reasonable nor prudent under the existing circumstances.

Appellee said when he came to the ice-covered portion of the highway he saw that several cars had been through there and they made one track close to the middle of the road and he naturally followed that track. He also said that he did not know his location on the highway at the time of the collision until measurements had been made. He thought before that he was on his side (the west side) of the highway. The statute, subject to exceptions, requires the driver of a vehicle to drive it upon the right half of the highway. § 39-746, R. R. S. 1943. Drivers of vehicles traveling in opposite directions are required to pass on the right, each giving to the other half of the main-traveled portion of the roadway as nearly as possible. § 39-748, R. R. S. 1943. Appellee operated the Ford down the center of the highway from north to south a distance of about 300 feet immediately before and at the time the automobiles came in contact. The contact of the automobiles was near the very center of the highway. There is no showing in the record that the highway was in any better or safer condition for traveling in the center of it than it was in the west or the right lane of the highway. The reason appellee gave for traveling in the

center of it was that several cars had done so and naturally or as a matter of course or custom he followed that conduct in that regard. The observance of a practice or custom which is contrary to a statute upon the subject does not prevent a motorist from being guilty of a violation of the statute. Mann v. Standard Oil Co., 129 Neb. 226, 261 N. W. 168. The record is convincing that appellee was continuously occupying and using the center of the highway from the place where the ice commenced on it for a distance of about 300 feet to the place and time of the accident, including the distance he traveled after he said he knew appellant was not going to stop before he moved from the private lane onto the highway. The statement in Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435, is not wholly inappropriate to this situation: "The defendant contended that when he first saw the Doerfler car they were about 550 feet apart, and Doerfler was driving on the wrong side of the road, but defendant did not pull over clear to the right, or pull over clear to the left of the center line, but continued right down the middle of the road; in other words, it appears that he did the only thing he could do to insure that an accident would occur." The conduct of appellee in the respect last discussed was a total disregard under the circumstances of this case of the prudence and due care which the law exacts of a motorist.

Appellee argues that appellant was required by the law of the road to yield the right-of-way to all vehicles approaching on the public highway because appellant was moving from a private driveway to and upon a public highway. Appellee says it was the duty of appellant to have yielded the right-of-way upon such county highway to appellee. Appellee further says that the finding of the trial court that the sole and proximate cause of the collision and the damage was the negligence of appellant in entering a county highway from a private lane without yielding the right-of-way

to appellee was the only reasonable conclusion that could have been reached in this case. Implicit in these statements is the idea that the right-of-way to which appellee was entitled extended to and included the whole of the county highway. The relevant statute, section 39-752, R. R. S. 1943, provides in part: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway."

In Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747, this court said: "A driver upon a public highway at a lawful and reasonable rate of speed has the right of way over vehicles entering the highway from a private road or drive, and is not required to slow down or stop upon the appearance of such other vehicle about to enter the highway until it should appear to a reasonable person in his position that the driver of such vehicle was not going to comply with the law and yield the right of way." See, also, Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

It is not every traveler upon a public highway, then, who is entitled to the right-of-way over one entering from a private lane or drive because by the reference above made such right is limited to a driver on a public highway who is traveling at a reasonable and lawful rate of speed. The court also observed in Klaus v. Soloman Valley Stage Lines Co., *supra*, the following: "This involves a consideration of the duties which a driver upon a public highway owes to persons entering upon such highway from a private driveway. Generally speaking they are: To drive at a reasonable rate of speed, to keep a proper lookout, and to avoid a collision if it can be done by the exercise of ordinary care."

Bainter v. Appel, 124 Neb. 40, 245 N. W. 16, considered the right-of-way of a motorist who was traveling west on the north or right lane of a highway in a cloud of dust and was struck by an eastbound truck which encroached upon the north lane of the highway. The

court said: "In the present case the car of plaintiff was correctly placed and at the time of the impact, as well as prior thereto, was traveling in a lawful manner where and as the terms of this enactment directed. Plaintiff, then, as to the north half of this highway, had the exclusive statutory right of way as against eastbound traffic thereon."

Carley v. Zeigler, 156 Cal. App. 2d 643, 320 P. 2d 165, considered these facts: The accident took place in the east half of Snyder Lane, a county highway which extended north and south. Carley admitted he was driving down the center of Snyder Lane in a southerly direction when his automobile struck a milk truck being operated by Zeigler which entered Snyder Lane from a private driveway on the east and was turning north thereon. The front wheels of the truck were from 2 to 4 feet from the east edge of Snyder Lane when it was struck by the automobile of Carley. A provision of the Vehicle Code of California provided that the driver of a vehicle about to enter or cross a highway from any private road or driveway shall yield the right-of-way to all vehicles approaching on such a highway. The court said: "A truck driver entering a highway from a private driveway on the east and turning north was not required to yield the right of way to the east half of the highway to a vehicle being driven down the center of the highway in a southerly direction; the driver of the other vehicle only had the right of way to the west half of the highway. * * * A right of way does not include a right to encroach on that half of a highway on which cars coming from the opposite direction are entitled to travel. * * * Before a vehicle driver is entitled to the right of way he must be operating his vehicle within the law and not in violation thereof; if he drives down the center of the highway without excuse or justification in violation of Veh. Code, § 525, declaring that a vehicle shall be driven on the right half of the roadway, he does not have the right of way." In the

opinion the court said: "The accident herein occurred in the east half of Snyder Lane where respondent (Carley) had no right to be. Appellant (Zeigler) had no duty to yield 'the right of way' to the east half of Snyder Lane. Respondent only had the 'right of way' to the west half of Snyder Lane. The 'right of way' does not include a right to encroach upon that half of the highway upon which cars coming from the opposite direction are entitled to travel. * * * Moreover, 'before the driver of any vehicle is entitled to the right of way such driver himself must be operating his vehicle within the law and not in violation thereof.' (Hayes v. Emerson, 110 Cal. App. 470, 477 [294 P. 765].)." See, also, Hemrich v. Koch, 177 Wash. 272, 31 P. 2d 529; Dyer v. Wallner, 189 Wash. 486, 65 P. 2d 1281; Berman v. King Union Co., Inc., 80 R. I. 181, 94 A. 2d 428.

The statute concerning right-of-way of a vehicle traveling upon a public highway over a vehicle entering it from a private lane quoted above does not mean that any vehicle traveling on any part of the highway in any manner, however negligently approaching the private drive, has the right-of-way in the entire highway. It is the driver of a vehicle on a public highway approaching a private drive who is proceeding in his proper lane of travel in a prudent and reasonable manner, as the law requires, who is entitled to the right-of-way provided for by the statute. The right-of-way which the statute makes available does not include a right to encroach on the half or part of a highway on which traffic coming from the opposite direction is entitled to travel. A provision of law granting a right-of-way to a user of a highway is generally not absolute but relative and subject to the qualification that the person entitled to claim the right will exercise it with proper regard for the safety of himself and others.

Appellee was, under the circumstances of this case, guilty of negligence as a matter of law which was a

proximate cause of the collision involved herein and he may not in any event have a recovery of damages on his cross-petition. However, the amount of damages sustained by appellant is an issue of fact to be tried and determined and, because of matters hereinbefore set out, is subject to the defense of contributory negligence of appellant. Because of the comparative negligence statute, even though appellee was guilty of negligence as a matter of law and if it may be found that appellant was guilty of only slight negligence, the question of whether or not the negligence of appellee was gross in comparison therewith would still be a factual one for determination of the trier of the facts. Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318.

The judgment should be and is reversed and the cause is remanded to the district court for Perkins County for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

FRANK RODINE, APPELLEE, V. IOWA HOME MUTUAL CASUALTY COMPANY, AN INSURANCE CORPORATION, APPELLANT.
106 N. W. 2d 391

Filed November 25, 1960. No. 34760.

1. **Principal and Agent. The apparent authority or agency for which a principal is liable must be traceable to him. A principal is only liable for that appearance of authority or agency caused by himself.**
2. **———. Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against a principal to prove its existence or extent.**
3. **———. A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent.**
4. **———. It is an essential requirement of a valid and effective**

ratification of an unauthorized act by the principal that he have complete knowledge of the unauthorized act and of all matters related to it.

5. **Insurance: Reformation of Instruments.** If an insured can prove that he made a different contract from that expressed in the written policy furnished him by the insurer, he may have it reformed to conform to the contract he claims he made and he is not prevented by the fact he accepted the policy and did not examine it until after a loss occurred for which he claims the right of recovery.
6. **Insurance: Actions.** An insured cannot, however, disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance.

APPEAL from the district court for Adams County: EDMUND NUSS, JUDGE. *Reversed and remanded with directions.*

Haney & Walsh, for appellant.

Melvin K. Kammerlohr and *Whelan & Whelan,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellee asked damages for breach of an alleged oral contract with appellant indemnifying appellee against loss for damages caused to the property of others by reason of the operation of a truck owned and operated by appellee. The amount of the recovery sought was the expenditures appellee was required to make because of damages caused by an accident in which his truck was involved about December 22, 1952.

The substance of the cause of action stated in the second amended petition of appellee, hereafter designated petition, is that appellant through Sam Arnold, its authorized local selling agent at Hastings, Nebraska, in consideration of a premium, agreed to insure appellee for 1 year on or about December 16, 1952, with

a policy of insurance identical with a policy previously issued to appellee by appellant on the same specifically-described property and on the same terms and conditions except for the commencement and expiration dates of the term of the policy, the expiration date of said previous policy being October 3, 1952, a copy of portions of the policy being attached to and made a part of the pleading; that Sam Arnold, the agent, had actual or apparent authority from appellant to sell property damage liability insurance with a coverage not to exceed $5,000 on each vehicle insured and of unlimited territorial coverage within the United States and to bind appellant thereby; that appellant by action of its home office in Des Moines, Iowa, accepted and ratified the agreement of its agent, Sam Arnold, on the day it was made; that all of said written and oral agreements constituted the contract between appellant and appellee; that appellant became liable under the terms of the agreement to pay any amount not in excess of $5,000 for which appellee became liable for damages to property because of the ownership and operation of the truck described in said agreement and owned by appellee and in reference to which the said agreement was made; that by the agreement appellant bound itself to defend any suit against appellee and pay all expenses and costs incident thereto; that on or about December 22, 1952, the truck while being operated by an employee of appellee in the State of Missouri was involved in an accident as a result of which damages were caused to property of other persons in that state on account of which appellee was compelled to and did pay the sum of $3,592.93; that as a direct result of the accident appellee was required to incur and pay for services of his legal counsel $743.95 and other necessary expenses in the sum of $84.37; and that all of the expenditures were necessary, fair, and reasonable and were caused by the refusal of appellant to perform its agreement with appellee made and existing as aforesaid.

The recovery sought by appellee was $4,421.25 with interest and costs.

The answer of appellant was a denial of the claims made in the petition of appellee and an assertion by appellant that any contract entered into by it and appellee was a written one consisting of a policy of insurance issued to appellee by appellant on December 17, 1952, in accordance with the request of the former for sufficient insurance to secure the release of his truck from the port of entry at Fort Scott, Kansas, and to cover it on the return trip to Hastings, Nebraska, a copy of which policy of insurance was attached to and made a part of the answer of appellant; that the issuance of the policy of insurance was confirmed by telegram to the port of entry that date and a copy of the telegram was attached to and made a part of the answer; that any prior oral dealings of appellee and appellant were merged in the said written contract; and that the policy of insurance by its terms provided no insurance or indemnity coverage to appellee for any accident occurring in the State of Missouri.

The trial of the case resulted in a verdict against appellant and in favor of appellee in the amount claimed. Appellant made a motion for a directed verdict at the close of the testimony offered and received in the case, which was denied. A motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial was made by appellant and was denied. Judgment was rendered in accordance with the verdict. This appeal contests the correctness of the action of the trial court.

Appellee in December 1952 lived near Hastings, was a farmer, a feeder of cattle, a buyer of grain, a dealer in all kinds of feeds, and the owner and operator of a truck. He had transported grain to Kansas, Missouri, Oklahoma, and Texas and on the return trips hauled feed and salt until there was a decrease in the demand for the service about October 1952 when he ceased main-

taining a regular schedule and contemplated selling his truck.

In December 1952 he owned a Chevrolet tractor, motor No. FEA 358154, and a 1946 Fruehauf semi-trailer, factory No. SF 14089. The tractor and trailer will be referred to herein as the truck. In that month appellee loaded the truck with a cargo of baled hay for transportation to a government disaster area in Kansas and Missouri for the purpose of selling it there because he thought it would bring more money than it would elsewhere. Raymond Osgood, designated Osgood herein, a driver for appellee, operated the truck on this trip. He was given no specific instructions by appellee. Appellee heard from Osgood when he was about 50 or 75 miles west of Scott City, Kansas. Fort Scott, Kansas, was probably intended rather than Scott City, Kansas. Osgood reported that he could not sell the hay. The driver of the truck reported to appellee when he was at the port of entry at Fort Scott, Kansas. He then said that the truck would not be given clearance because it had no insurance coverage.

Appellee called on Sam Arnold, hereafter called Arnold, who was engaged in the insurance business in Hastings, the following morning, December 17, 1952. Appellee had secured insurance to meet his needs at different times during a period of about 17 years through Arnold from appellant. The premiums on the insurance policies which he secured from Arnold were paid to him by appellee when the policies were received from the company which issued them. Any claim appellee made because of the insurance was presented through the office of Arnold. All insurance policies appellee secured from appellant were issued by it at its home office at Des Moines, Iowa.

The truck had public liability and property damage insurance coverage issued by appellant for 1 year which expired on October 3, 1952. That policy on the truck was not renewed. A renewal policy was prepared and

tendered by appellant to appellee for an additional 1-year period from October 3, 1952, but it was not accepted by appellee because he was attempting and intended to sell the truck.

Appellee told Arnold at his office on December 17, 1952, that the insurance on the truck had expired but appellee thought insurance would not be required for transportation of hay since it was a farm commodity; that he had never been detained at a port of entry before when he was trucking hogs or cattle to St. Joseph and Kansas City, Missouri; and that was what he figured on the hay—that he did not need insurance. He told Arnold that he had hay on the truck and he had to have some insurance. Appellee testified he said to Arnold in his office on that date that he, appellee, wanted the same kind of a policy as the last one he had that was in force—the old policy. Arnold asked appellee for the number of it but he did not have it. Arnold secured the number of the old policy that was in force from his files and wrote something, "* * * a policy or a thing right there at that time, and when he fixed it all up for us * * *." Appellee figured he was insured. Appellee said he left the office of Arnold with that in mind, that he was protected, and "I had insurance made out * * *." Appellee afterwards testified that he did not know what Arnold wrote at that time and that he then received nothing in writing from Arnold. Appellee said that when he told Arnold he wanted insurance the same as the policy last in force he referred "To the policy that was in force and had no limitations on" which expired October 3, 1952. When appellee left the Arnold office that morning he advised the port of entry at Fort Scott, Kansas, by telephone that he had made arrangements for insurance on the truck. The person with whom he talked asked where the policy of insurance was made out and the appellee told him at Des Moines. The man at the port of entry told appellee he would not accept information of

the existence of insurance over the telephone and that appellee should get a telegram from the office at Des Moines before the port of entry could consider whether satisfactory insurance had been secured. Appellee returned to the Arnold office and told him what the man at the port of entry had said and what he requested. Arnold called the insurance company office in Des Moines by telephone and told the person with whom he talked what the port of entry required. Appellee was present but in his testimony did not attempt to state what he heard Arnold say in that conversation. The next time appellee heard from Osgood he was in Springfield, Missouri.

Appellant on December 18, 1952, issued a new policy of public liability and property damage insurance on the truck to appellee as insured which policy was in all respects satisfactory to him except it contained a provision limiting the use of the truck covered by the insurance to "within a 300 mile radius of Hastings, Nebraska, in the State of Nebraska; 260 miles into Kansas from a point where U. S. Highway No. 281 intersects the Nebraska-Kansas state line." Appellant advised the Kansas port of entry at Fort Scott, Kansas, by telegram that it had issued public liability and property damage coverage on the truck of appellee while it was used in the State of Kansas. The policy of insurance issued by appellant December 18, 1952, was sent to Arnold and was delivered by him to appellee. He on January 16, 1953, requested that the policy be canceled because he claimed it was not what he had requested on December 17, 1952, because of the limitation contained therein concerning the area within which the use of the truck was covered by the policy. The policy was that day canceled on request of the insured. Appellee paid the premium on the policy from December 17, 1952, to January 16, 1953, the date it was canceled. The policy of insurance of appellant issued to appellee which expired October 3, 1952, afforded public liability and

property damage coverage on the truck without limitation as to the use of the truck in the United States.

Arnold testified he had been in the general insurance business at Hastings for 30 years and he represented a number of insurance companies including appellant. The scope of his authority as a representative of appellant is stated in a document produced in evidence which contains the following: "The Company hereby appoints the said S. A. Arnold dba Arnold Insurance Agency as a soliciting Agent for Hastings, Nebraska and vicinity, with authority only to solicit applications for insurance acceptable to the Company, and to collect and receipt for fees for transmission to this Company at Des Moines, Iowa, on such applications as are approved by the Company and upon which policies are issued by the Company." Appellant did not furnish Arnold any incompleted forms of insurance policies and he had never filled out, completed, or issued any policies of insurance for appellant. His authority to represent appellant was only as a soliciting agent. Arnold was acquainted with appellee for a considerable period of time and had during that time secured insurance policies for him from appellant. Arnold made application to appellant at the solicitation of appellee for a policy of insurance covering a truck owned by him for the period of 1 year which expired October 3, 1952. The policy was issued at the home office of appellant, mailed to Arnold, and he delivered it to appellee. He came to the office of Arnold December 17, 1952, and they had a conversation about insurance of the truck which appellee said was then at Fort Scott, Kansas. He requested Arnold to see if he could get appellee insurance coverage on the truck. Appellee said that the truck was detained at the Fort Scott, Kansas, place and he needed some insurance to get it released so that he could get it home. The home of appellee was Hastings, Nebraska. Arnold after the conversation made an oral application to appellant by a telephone call to its home office in Des Moines for public liability

and property damage coverage so that appellee could get the truck loose from the port of entry. Arnold asked appellant for a 300-mile radius provision in the policy because the local radius was 75 miles, the next or intermediate was 150 miles and that was not enough to get appellee to and from Fort Scott, Kansas, so Arnold asked a 300-mile radius from Hastings, Nebraska. Arnold said he referred the home office of appellant in the telephone conversation of December 17, 1952, to the last policy that had been issued, in which appellee was named as insured and which was then in the home office files, for information to complete the policy he had asked for such as description of the truck, motor number, and serial number. The policy referred to by Arnold as the last policy issued was dated September 18, 1952. The policy period was stated therein as October 3, 1952, to October 3, 1953, and the policy was identified, offered in evidence, and admitted in the trial of this case as exhibit No. 8. This policy was not ordered or accepted by appellee and it never became effective. Arnold made no request to appellant to issue any coverage on the truck for appellee in Missouri. The request of Arnold was accepted by appellant, a policy was issued (exhibit No. 2), sent by mail to Arnold, and he transmitted it to appellee. He afterwards returned that policy of insurance to Arnold for cancellation and it was canceled January 16, 1953, as shown by the exhibit. Arnold said he asked appellant for a 300-mile radius because that was necessary to get the truck home to Hastings, Nebraska. Arnold and appellee had no conversation December 17, 1952, regarding any territorial limitation in the policy he asked Arnold to get for him.

Appellee testified that Osgood called him and told him about the accident. Appellee next saw the truck after it left Hastings in charge of Osgood shortly before Christmas of 1952 at Forrest City, Missouri. It was in bad condition. It was standing in the filling station or against it all mashed up. The canopy of the service sta-

tion had fallen down onto the truck. Appellee told Arnold before Christmas in 1952 about the accident in which the truck was involved and what had happened in Forrest City. The truck appellee saw at Forrest City, Missouri, at the filling station was the same one appellee had asked Arnold to secure coverage for at his office December 17, 1952. Forrest City, Missouri, is 160 miles from Hastings. There were numerous claims for damages asserted against appellee as a result of the accident in which the truck was involved. Appellant failed and refused to take any action in reference to them. Appellee necessarily, fairly, and reasonably expended an amount equal to the recovery he seeks in this case in defending against and disposing of the claims for damages against him.

The essence of the claim of appellee as stated in his petition is that on or about December 16, 1952, Arnold was an authorized local selling agent for appellant at Hastings, Nebraska; that he as such agent had authority, actual or apparent, from appellant to sell property damage liability insurance not in excess of $5,000 on each vehicle insured with unlimited territorial coverage within the United States and thereby by his acts in that regard to bind appellant by an agreement made with Arnold that appellant by and through Arnold, its authorized local selling agent, agreed to insure appellee for 1 year from that date by a policy of insurance identical, except as to the policy period, with a policy previously issued to him by appellant on the same specifically-described property, that is, his truck, which previous policy expired on October 3, 1952, and is exhibited by the record as exhibit No. 1; that appellant at its home office accepted and ratified the agreement of its agent Arnold on the day it was made and became thereby liable to pay an amount not in excess of $5,000 for which appellee became responsible for damages because of his ownership and operation of the truck which was thus insured; and that appellant was by the agreement bound

to defend any action against appellee for such damages and to pay all costs and expenses incident thereto.

There is an absence of evidence that Arnold had actual authority of the character and extent alleged by appellee in his petition and above recited. The actual authority granted to Arnold by appellant was evidenced by and expressed in a written and executed agency agreement between appellant and Arnold in which the former was called "Company" and the latter the "Agent." The relevant parts thereof are the following: "* * * nothing contained herein shall be construed to create the relation of employer and employee between said Company and said Agent. * * * The Company hereby appoints the said S. A. Arnold dba Arnold Insurance Agency as a soliciting Agent for Hastings, Nebraska and vicinity, with authority only to solicit applications for insurance acceptable to the Company, and to collect and receipt for fees for transmission to this Company at Des Moines, Iowa, on such applications as are approved by the Company and upon which policies are issued by the Company. * * * All fees and money received by the Agent for business transacted under this agency contract shall be in trust for the said Company to be transmitted promptly to its office at Des Moines, Iowa * * *. The Company retains the right to reject, alter, suspend, or cancel at any time any application or any policy and return the unearned fees on such policy * * *." There was no effort made herein to show anything contrary to the terms and provisions of the agency agreement or that either party thereto at any time acted contrary to or in violation of its terms. The presentation of this case in this court by appellee does not include a contention that there was any evidence of actual authority of Arnold granted him by appellant to make such an oral agreement binding upon appellant as appellee pleaded in his petition. The written argument of appellee in this court goes no further than a claim of apparent authority of Arnold to make

the alleged agreement of December 16, 1952, and to bind appellant by it.

The evidence relied upon by appellee to support his claim that Arnold had apparent authority to enter into a policy of insurance or to make an agreement to do so binding upon appellant was that Arnold had previously presented policies of insurance to appellee which he had ordered through Arnold and which were issued and fully executed at the home office in Des Moines, Iowa, and were sent to Arnold to be given to appellee; that Arnold had received the premiums on the policies from appellee for transmission to appellant; and that appellee had presented any claims he had because of insurance to the Arnold office in Hastings, Nebraska. There was no other fact concerning any such claim. There was nothing in any of these acts that had any relation to authority of an agent to make an agreement for insurance or to issue an insurance policy binding upon the principal. The participation in or approval by appellant of any of these acts did not reasonably create an appearance of authority for Arnold to validly issue a policy of insurance or to make the agreement claimed by appellee.

Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous. In Farmers Cooperative Shipping Assn. v. Adams Grain Co., 84 Neb. 752, 122 N. W. 55, this court said: "It is well established that the authority of an agent cannot be established by his own acts and declarations. * * * Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine

of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency,"

Maryland Casualty Co. v. Moon, 231 Mich. 56, 203 N. W. 885, states: "The apparent authority for which the principal may be liable must, however, be traceable to him and cannot be established by the acts and conduct of the agent. The principal is only liable for that appearance of authority caused by himself."

American Nat. Bank v. Bartlett, 40 F. 2d 21, declares: "The underlying rule of the law of agency is that 'The party dealing with the agent * * * must be able to trace the authority on which he relies back to some word or deed of the principal.' Mechem on Agency (2d Ed.) §§ 210, 750."

In Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co., 156 Neb. 366, 56 N. W. 2d 288, it is stated: "This court has treated ostensible and apparent agency as synonymous."

It is stated in Restatement, Agency, § 8, p. 25, that: "Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent." That statement of the law was quoted with approval by this court in Oleson v. Albers, 130 Neb. 823, 266 N. W. 632, 105 A. L. R. 714. See, also, Ware v. Home Mutual Ins. Assn., 135 Neb. 329, 281 N. W. 617; Stewart v. Spade Township, 157 Neb. 93, 58 N. W. 2d 841; 2 Am. Jur., Agency, § 103, p. 85.

It is generally required before a recovery may be predicated upon apparent authority that the person dealing with the agent must establish that at the time he dealt with the agent he believed that the agent was acting within the scope of his authority and that he had no notice or knowledge of any fact or circumstance

which would indicate to a reasonably prudent person in similar circumstances that the agent had no actual authority to bind his principal in the matter.

Appellee has secured the insurance he desired at various times during a period of about 17 years through Arnold from appellant. All of the policies were issued by appellant and fully executed by it at its home office in Des Moines, Iowa. They were sent to Arnold by the appellant, Arnold presented them to appellee, and Arnold received from him the premiums for transmission to appellant. This was notice to and knowledge of appellee that Arnold could not bind appellant on a contract of insurance. Arnold during this long period had not, to the personal knowledge of appellee, attempted to exercise any such authority.

There was additional evidence of appellee the effect of which was that he actually knew on December 17, 1952, while he was negotiating with Arnold that he had no authority to make any policy or agreement of insurance for appellant. Appellee after he left the office of Arnold the first time on the morning of December 17, 1952, advised the port of entry at Fort Scott, Kansas, by telephone that he had made arrangements for insurance on his truck and that the port of entry could release it. The person there to whom appellee talked inquired where the policy of insurance on the truck was made out and appellee answered that inquiry by saying at Des Moines. The man at the port of entry told appellee he would not accept information of the existence of insurance by telephone and that appellee should get a telegram from the insurance company at Des Moines before the port of entry would even consider whether satisfactory insurance had been secured on the truck of appellee. The testimony of appellee in this respect was definite, positive, and conclusive that appellee knew that Arnold had no authority to make any contract of insurance binding on appellant and that any insurance secured from appellant had to be acted

upon and made at its home office in Des Moines, Iowa. There is no evidence in this case of apparent authority of Arnold to make such an agreement as that relied upon by appellee in this litigation as a foundation for his claimed right of recovery from appellant.

A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent.

In Dietz v. City Nat. Bank of Hastings, 42 Neb. 584, 60 N. W. 896, it is said: "Where it was known to the president of a bank that the indorsement of the name of the payee on a note by one assuming to make such indorsement as the payee's agent, was outside the scope of his powers, such indorsement is not binding on the alleged principal."

Heitsch v. Minneapolis Threshing Machine Co., 29 N. D. 94, 150 N. W. 457, L. R. A. 1915D 349, states: "It is well established that a principal is not bound by the unauthorized acts of an agent which are not ratified by him, and where the lack of authority is known or should be known to the third party." See, also, National Council Junior Order United American Mechanics v. Thompson, 153 Ky. 636, 156 S. W. 132, 45 L. R. A. N. S. 1148; 2 Am. Jur., Agency, § 103, p. 85.

Appellee pleaded as a part of his cause of action that appellant at its home office accepted and ratified the alleged agreement which he claimed was made on or about December 16, 1952. There is no evidence that appellant knew before the commencement of this litigation almost 3 years after that date that appellee claimed he told Arnold on December 17, 1952, that appellee wanted a policy on his truck identical, except as to the policy period, with the previous policy thereon which expired October 3, 1952, identified herein as exhibit No. 1, and that he claimed that Arnold agreed for appellant to insure appellee as to his truck on that basis. There is no

proof that appellant before this litigation had any information from any source of the insurance agreement claimed to have been made about December 16, 1952, as alleged in the petition of appellee. Arnold is the only person who communicated with appellant concerning the negotiations and conversation had by appellee and Arnold on December 17, 1952. He testified that appellee came to his office that date and they had a conversation about the truck of appellee which he said was at Fort Scott, Kansas. He said it was detained there and he needed some insurance to get it released so that he could get it home, and he requested Arnold to see if he could get appellee insurance coverage on the truck. Arnold made an oral application to appellant at its home office in Des Moines for public liability and property damage coverage on the truck to assist appellee in getting the truck released from the port of entry and back to Hastings. Arnold asked appellant for a 300-mile radius from Hastings provision and referred the home office to the last policy that had been issued in which appellee was named as insured, identified in the record as exhibit No. 8, for information to complete the policy he had asked to be issued to appellee. Arnold said no request was made to him by appellee for coverage on the truck in Missouri and there was no conversation about territorial limitation but he asked for a 300-mile radius which he thought was necessary to get the truck from where it was to Hastings.

There could not have been any acceptance or ratification by appellant of the insurance agreement appellee claimed was made because acceptance or ratification is impossible for one who has no knowledge of the subject matter.

In Dietz v. City Nat. Bank of Hastings, *supra,* it is said: "To the ratification of an unauthorized indorsement of his name, knowledge of the act to be ratified must be shown to have been had by the party sought to be charged by the alleged ratification."

LeBron Electrical Works, Inc. v. Livingston, 130 Neb. 733, 266 N. W. 589, declares: "In order for a ratification of the acts and declarations of a third person to be binding upon a person, it must, as a rule, be made by him with full knowledge of all the facts necessary to an intelligent exercise of the right of election."

American Nat. Bank v. Bartlett, *supra,* contains the following: "From this statement, it is apparent that no question of ratification in fact, or of ratification by voluntary retention of the benefits of an agent's unauthorized act, is present; and this for the reason that neither the corporation nor Mr. Mayer had any knowledge of the execution of the mortgage prior to the bankruptcy. Full knowledge of the unauthorized act, and of all material matters related to it, is an essential of a valid ratification."

The oral application for an insurance policy covering the truck of appellee was made to appellant by Arnold on December 17, 1952, it was accepted, and a fully executed policy was issued by appellant in which appellee was designated the insured for the period of December 17, 1952, to December 17, 1953. It was transmitted by mail to Arnold and he delivered it to appellee. Appellant advised the port of entry of the issuance of the policy and passage of the truck was cleared by it. Appellee testified that the policy was satisfactory in all respects except the provision therein limiting the use of the truck within designated areas. Appellee on January 16, 1953, requested that the policy be canceled because he claimed it was not what he asked for on December 17, 1952. His objection was to the limitation of the policy concerning the areas in which the use of the truck was covered. Appellee paid the premium on the policy from December 17, 1952, to January 16, 1953, and it was canceled on the last date named. The petition of appellee in this litigation does not mention the issuance and existence of the policy of insurance last described. He elected to wholly disregard it though

it was in force at the time of the accident in which the truck of appellee was involved on December 22, 1952. Appellee did not seek reformation of the policy to eliminate the provision therein to which he objected but he has sought recovery on the basis of the alleged oral agreement for insurance which he says was made about December 16, 1952, by Arnold on behalf of and for appellant. This course of procedure has been disapproved by this court.

A recent decision of this court definitely indicates that if it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law, such as appellee is attempting to maintain to have a recovery otherwise than in accordance with the terms of the policy, but the proper remedy is for a reformation of the policy to conform to the alleged oral understanding. Adolf v. Union Nat. Life Ins. Co., 170 Neb. 38, 101 N. W. 2d 504. Of course, if appellee can prove that he made a different contract from that expressed in the policy which appellant issued to him on December 18, 1952, he may have it reformed and then have a recovery on it as reformed. It is said in Mutual Benefit Health & Acc. Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780: "If the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity, and he is not prevented by the mere fact that he accepted and retained the policy and did not examine it until after a loss occurred." See, also, Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126. A litigant cannot, however, disregard the written contract as evidenced by a policy of insurance issued to him and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

The motion of appellant for a judgment notwithstanding the verdict should be sustained. The judgment is reversed and the cause is remanded to the dis-

trict court for Adams County with directions to sustain the motion of appellant for a judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

ANNA LEE HAITH, APPELLANT AND CROSS-APPELLEE, V. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE AND CROSS-APPELLANT.
106 N. W. 2d 169

Filed November 25, 1960. No. 34790.

1. **Trial: New Trial.** When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict.
2. **Insurance: Evidence.** In cases such as that at bar, the presumption against death by suicide is prima facie only and rebuttable by defendant. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced by defendant showing that the death was caused by suicide and the burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide.
3. **Insurance: Trial.** Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict.
4. **Trial: New Trial.** It is also the rule that a verdict which is contrary to the evidence and thus clearly wrong should be vacated for the reason that it is not sustained by the evidence and is contrary to law, and that in such cases if a motion for directed verdict has been timely made and overruled a request for judgment notwithstanding the verdict should be sustained and judgment rendered in conformity with the motion to direct a verdict instead of granting a new trial.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed and remanded with directions.*

John R. Doyle, for appellant.

Mason, Knudsen, Dickeson & Berkheimer, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Anna Lee Haith, as the wife of David A. Haith, deceased, hereinafter called Haith, and as the beneficiary of a $3,000 life insurance policy issued to Haith on November 28, 1956, during his lifetime by defendant, The Prudential Insurance Company of America, brought this action against defendant seeking to recover $6,000 under the "Accidental Death Benefit Provision" of the policy. In that connection, plaintiff alleged that on or about April 15, 1958, while said policy was in full force and effect, Haith met his death through external, violent, and accidental means, namely by a gunshot wound. A copy of the policy was attached to and made a part of plaintiff's petition.

Defendant's answer admitted issuance of the policy involved as alleged; that plaintiff was beneficiary therein; that from the time the policy was issued to and including the time of Haith's death on April 15, 1958, all of the monthly premiums had been paid on said policy; and that plaintiff had filed a proof of loss, which claim defendant had refused to pay. Defendant then denied generally and alleged that a suicide clause of said policy provided that: "Suicide. — Death of the Insured from suicide within two years from the policy date, whether the Insured is sane or insane, shall limit the company's liability to the return of the amount of premiums paid." Defendant then alleged that the death of Haith was from suicide caused by a self-inflicted gunshot wound with the intention of taking his own life and bringing about self-destruction, which suicide occurred on April 15, 1958, within 2 years of November 28, 1956, the policy date; that total premiums paid on such policy amounted

to $132.77; and that no amount was due on the policy to plaintiff from defendant except such amount of premiums paid. Defendant then alleged that one of the accidental death benefit provisions of the policy stated that: "Exceptions: No Accidental Death Benefit shall be payable if injury or death results (1) from suicide or any attempt thereat, whether the Insured is sane or insane: * * *," and that since Haith's death was caused from suicide as theretofore alleged, there was no accidental death benefit due and owing plaintiff from defendant. Defendant also alleged that on August 27, 1958, and again on September 17, 1958, defendant tendered to plaintiff the sum of $132.77 for the total premiums paid.

Plaintiff's reply denied generally the new matter in defendant's answer, but admitted that the policy contained the "Suicide" clause and "Exceptions" as alleged by defendant; that the death of Haith resulted from a gunshot wound; and that defendant had tendered to plaintiff $132.77, the total sum of the premiums paid as alleged by defendant, which tenders were refused by plaintiff.

Upon trial to a jury, and at conclusion of the evidence, defendant moved for a directed verdict in favor of plaintiff for only the amount of the premiums paid because the evidence was insufficient to show an accidental death under the accidental death benefit provisions of the policy, and that the evidence showed that the only reasonable hypothesis was that of suicide. Such motion was overruled.

Thereafter, upon submission to a jury, it returned a verdict for plaintiff, and judgment was rendered accordingly. Thereafter, defendant filed a motion for judgment notwithstanding the verdict, in accord with its motion for a directed verdict, or in the alternative for a new trial. After a hearing thereon, the court set aside the verdict and judgment and granted a new trial without giving a reason for that decision and with-

out directly disposing of defendant's motion for judgment notwithstanding the verdict, which, however, in legal effect operated as a denial of defendant's motion for judgment notwithstanding the verdict. See, Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609; Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640; Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

Thereafter plaintiff appealed, assigning that the trial court erred in granting a new trial, and defendant cross-appealed assigning that the trial court erred in failing to sustain defendant's motion for directed verdict and in failing to grant defendant's motion for judgment notwithstanding the verdict. We sustain defendant's cross-appeal.

Plaintiff relies upon certain rules reaffirmed in Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739, wherein we held that: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

"The Supreme Court is not vested with authority by the Constitution or laws of the state to set aside the verdict of a jury, having for its support sufficient competent evidence, even though this court may be of the opinion that had it been the trier of the case, it would have reached a different conclusion.

"While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

Plaintiff also relies upon Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, wherein the

trial court granted a new trial and we held that: "If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." However, herein defendant cross-appealed and thus had a right to point out the prejudicial error that defendant contends exists in the record and which defendant contends did not justify the decision of the trial court in granting a new trial when a judgment notwithstanding the verdict should have been rendered.

On the other hand, defendant relies upon Sawyer v. Mutual Benefit Health & Accident Assn., 121 Neb. 504, 237 N. W. 615, a case comparable in all material respects with that at bar. Therein this court cited and quoted with approval from Grosvenor v. Fidelity & Casualty Co., 102 Neb. 629, 168 N. W. 596. Such cases concluded, and it is the well-settled rule in this jurisdiction, that the presumption against death by suicide is prima facie only and rebuttable by defendant, and such presumption is overcome and disappears when either direct or circumstantial evidence is introduced by defendant showing that the death was caused by suicide, and the burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. See, also, Dodder v. Aetna Life Ins. Co., 104 Neb. 70, 175 N. W. 651; Peabody v. Continental Life Ins. Co., 128 Neb. 23, 257 N. W. 482. Such cases are also authority for application of the rule that when the evidence, whether direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide and the evidence is clearly inconsistent with any other explanation, the

trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict; and that a verdict which is contrary to the evidence and thus clearly wrong should be vacated for the reason that it is not sustained by the evidence and is contrary to law.

As we view it, the sole material and decisive question presented is whether or not the trial court should have sustained defendant's motion for directed verdict and whether a judgment notwithstanding the verdict should have been rendered in conformity with the motion to direct a verdict instead of granting a new trial. In that connection, as held in Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

We have heretofore summarized the pleadings and admissions made therein, which will not be again repeated at length. The substance thereof, together with evidence adduced by plaintiff in chief, was that plaintiff was the wife of Haith at the time of his death and the beneficiary named in the policy of insurance issued by defendant to Haith on November 28, 1956, a copy of which was attached to and made a part of plaintiff's petition and the original of which was offered by plaintiff and received in evidence. Its provisions applicable herein and the interpretation thereof are not questioned in any proper manner, and admittedly such policy was in force and effect on April 15, 1958, the date of Haith's death, when all monthly premiums in the total sum of $132.77 had been paid. Admittedly, Haith's death resulted from a gunshot wound, and he was identified as

dead on April 15, 1958, by a deputy sheriff and a Lincoln lieutenant of police, and again on April 17, 1958, by plaintiff at the mortuary. Also, Haith's death admittedly occurred within 2 years from the policy date. Plaintiff testified, and their official "Record of Marriage," received in evidence, discloses that she married Haith in Nebraska City on March 12, 1956, when she was 29 years old and he was 24 years old. He had been twice previously married and divorced, and she had been once previously married and divorced. Prior to April 14, 1958, they had lived together at Elmwood with two children, one of whom was 11 years old and one of whom was 2½ years old at the time of trial.

Haith was a sheet metal worker employed by Capital Steel Company since December 1957. He left their home at Elmwood about 6:30 a.m. on April 14, 1958, driving a 1953 Ford two-door car owned jointly by the parties. That was the last time he was seen alive by plaintiff. She testified that they seldom quarreled; that he had a happy disposition; that he was easy to live with; that he was a good father; and that he provided for plaintiff and the children. She testified that she never knew him to buy a gun but that once shortly after their marriage he had borrowed a rifle which was taken back when she asked him to do so, and that she never saw a rifle around the house again. She knew that he had been to a named doctor in Lincoln a couple of weeks before his death for treatment of an earache about which he had complained, but that he had theretofore made no other complaints except once when he got a piece of steel in his eye which steel had been properly removed. The named doctor was not called as a witness at the trial. Plaintiff testified that Haith was about 5 feet 6 inches tall; slight of build; weighed 130 to 140 pounds; and that he had short arms requiring him to wear shirts about size 14, with 30 inch sleeves. Plaintiff then rested.

Thereupon, uncontradicted evidence adduced by de-

fendant was as follows: The Lincoln police department usually called the sheriff of Lancaster County and his deputies in cases such as that at bar because they were acting county coroners. A deputy sheriff was called to investigate the death of Haith at about 2:27 a. m., April 15, 1958. Upon his arrival at 2051 Worthington, the residence of one June I. Lawson and her husband, the deputy sheriff found that a lieutenant and two other police officers of the Lincoln police department had already arrived. There Haith was found dead in the two-door Ford car parked in the Lawson driveway. He was sitting on the left front seat of the car behind the steering wheel with the ankle of his right leg on the driver's seat cushion up under his buttocks, and with his left foot at an angle on the floor of the driver's side. His head drooped down upon his chest. His left hand was in his lap. His right arm hung over the back of the left front seat and he was bleeding profusely from a bullet wound on his forehead about an inch above the bridge of his nose. His right index finger was in the trigger guard of a 22-caliber rifle. The butt of the rifle stock was resting on the back seat and the barrel was pointing toward the front of the car through the space between the two front jump seats. There was one or two empty coke bottles and a 7-Up bottle half full sitting upright on the little open door of the glove compartment. The bottles had the odor of alcoholic contents, and a three-fourths empty quart of whiskey and some full coke bottles were found elsewhere in the car.

The interior of the car and Haith's clothing were examined. His clothing was not in disarray and no evidence of a struggle was found on his body or in the car. The deputy sheriff took the rifle from the car into his custody and subsequently delivered it to the sheriff's office where it was kept in a gun case in that office until the trial, whereat the rifle was offered and received in evidence. At the trial the rifle was officially identified as a 22-caliber Marlin bolt-action repeater,

and when found it had a clip of seven 22-caliber shells in it and an empty shell case in the chamber of the barrel. There is ample competent evidence that the wound in the forehead of the deceased and that his death as well were caused by a 22-caliber bullet. Also, there were powder burns on his forehead and under the surface of the skin around the wound, caused by a discharge of the weapon while pressed against the skin.

Once or twice a week for several months previously, during his lifetime, deceased had been a customer of the Midway Tavern in Lincoln during the day or evening. There he would drink beer and play games with the waitresses when they were not busy. In doing so, he became acquainted with a Mrs. Meyers, a waitress named Mrs. Densberger, who was unmarried and lived with Mrs. Meyers at 412 South Twenty-fifth Street, and a waitress named Mrs. Lawson, who was married and lived at 2051 Worthington. During the evening of April 14, 1958, they had all planned to go out to Lavonne's Tavern located northeast of Lincoln on the Cornhusker Highway, where beer and foods were served and a band played for dancing. About 8 p. m., Haith drove his car and took Mrs. Densberger and Mrs. Lawson out to the Lawson home, where they all had a highball and Mrs. Lawson washed up and changed her clothes while Haith and Mrs. Densberger visited together. After about one-half hour, the three of them left as planned and went out to Lavonne's Tavern. Mrs. Meyers was there with others when they arrived. There they all drank beer, ate sandwiches, visited, and watched the dancing, but they did not dance. They stayed there until about midnight and upon leaving, Mrs. Lawson bought six bottles of coke and 7-Up to drink with whiskey. They then fixed one drink for each of them, spiked with Haith's whiskey, before leaving. They each had one such drink in Haith's car on the road home. Mrs. Lawson sat in the right front seat and Mrs. Densberger and Mrs. Meyers sat in the back seat of Haith's

car while he drove Mrs. Densberger and Mrs. Meyers to their home at 412 South Twenty-fifth Street where they arrived about 12:30 a. m. Haith then drove with Mrs. Lawson to 2051 Worthington where he parked his car on the driveway.

There he and Mrs. Lawson had one more spiked drink together, and, being without matches to light a cigarette, Haith suggested that she look in the glove compartment for them. She looked and found no matches therein but did find parts of a gun which Haith said belonged to his rifle. She also saw therein two boxes of 22-caliber shells, one of which contained 22 shorts and the other of which contained 22 longs. As they continued to visit, Haith said: " 'I haven't got much longer to live.' * * * 'The doctor said that I've got cancer of the brain and I've only got six months to live.' " She then expressed her sympathy and suggested that he go to Mayo Brothers where they did wonderful things, but he said, " 'No, the doctor said I haven't got much longer to live, maybe six months.' * * * 'You know, I'm in love with you.' * * * 'I'm in love with you, and I can't have you,' * * * 'You're in love with your husband' " to which she replied " 'Yes.' " Because Haith had always said that he was divorced, she then said: " 'There's a lot of girls around town,' " whereupon he said, " 'I haven't got much time to live, only about six months.' * * * 'I haven't got nothing to live for, and you haven't either.' " Haith then reached back in the car, pulled the rifle up, stuck the barrel between her eyes, clicked the gun, and said: " '* * * I'm going to kill you and then I'm going to kill myself,' " whereupon he started to push the gun down in her face so she grabbed it, pushed it up, and he pulled it around again, saying, " 'If you don't want me to kill you, I'll kill myself,' * * *." Thereupon she shoved the gun up against the roof top and said, " 'Don't be silly, you don't want to do that. If you want to kill yourself, go ahead, and I don't have to stay here and watch,'

* * *." She then became afraid, took out her house key, pushed down on the door handle, jumped out of the car, and ran into the house. There she turned off the living room light so no light could be seen in the house and so that she could pull back the window blinds and look out to see if Haith had left. There she heard no shot but she kept watch and never saw anyone else around the car but she could see that Haith's car still remained in the driveway. After waiting and watching until about 2 a. m. and Haith had not left, she called Mrs. Densberger by telephone, explained the situation, and asked her to come out at once. Mrs. Densberger then came to 2051 Worthington in a taxicab and entered the house. Upon being told what had happened, she went out alone to Haith's car and with the aid of a flashlight she saw blood upon him and thought something was wrong, so upon her return to the house, Mrs. Lawson called the police, repeated Haith's threats, and asked them to send someone out to her home. When the police came, she told them what had happened, and upon returning from observation of the car and the situation therein, the police called the deputy sheriff heretofore mentioned, who then came out to Lawson's home. About 4 a. m. Mrs. Lawson's husband was called at Columbus where he was then working, and he came to their home. The rifle was later identified as one belonging to Haith's brother.

Defendant's evidence heretofore set forth appeared in the testimony of the deputy sheriff, the police lieutenant, Mrs. Densberger, and a material portion of a deposition of Mrs. Lawson received in evidence after it had been shown by a deputy sheriff that Mrs. Lawson had moved to Wichita, Kansas; that she was out of the county of the place of trial or hearing; and that defendant had been unable to procure the attendance of the witness, Mrs. Lawson, by subpoena. Also, there was no showing that her absence was procured by defendant who offered the deposition. See subsections 3(b) and

3(d) of § 25-1267.04, R. R. S. 1943. True, upon offering such deposition testimony, defendant called attention to the wrong alphabetical subsections of section 25-1267.04, R. R. S. 1943, but the foundation for admission of the deposition testimony was complete and proper, in compliance with subsections 3(b) and 3(d) heretofore mentioned.

In rebuttal plaintiff called only Mrs. Densberger as a witness. The substance of her testimony was that she sat in the back seat of Haith's car while riding from the Lavonne Tavern to her home at 412 South Twenty-fifth Street; that during such period she did not knowingly sit on any gun or notice one on the floor of the car because she was not looking for any rifle or weapon and had no reason to do so; that she did not examine the ledge up by the rear window of the car or see a gun up there when she got in Haith's car; and that she then saw the cokes and 7-Up which they had obtained at Lavonne's but that she didn't notice anything else although there could have been something in the car, because she wasn't looking for anything. She testified that she saw a rifle in the car resembling the one received in evidence when she looked in Haith's car after she had arrived at the Lawson home in a taxicab.

As we view it, the evidence adduced in plaintiff's behalf amounted to no more than to create a presumption which was overcome by the undisputed facts and circumstances adduced by defendant which were so conclusive and inconsistent with any other hypothesis or explanation except suicide that the trial court should have directed a verdict as requested by defendant. Therefore, we conclude that the order of the trial court granting a new trial should be and hereby is reversed and the cause is remanded with directions that the trial court sustain defendant's motion for judgment notwithstanding the verdict, as requested by defendant, and accordingly render a judgment in favor of plaintiff and

against defendant for $132.77 with interest at the legal rate from April 15, 1958, to August 27, 1958, with costs taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

CHARLES HUEFTLE, APPELLANT, V. EUSTIS CEMETERY ASSOCIATION, APPELLEE.
106 N. W. 2d 400

Filed November 25, 1960. No. 34815.

1. **Statutes.** In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon.
2. ———. It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases.

APPEAL from the district court for Frontier County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

William S. Padley, for appellant.

Schroeder & Schroeder, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for injunction. The appeal presents primarily the question as to whether or not the word "city" in the first sentence of section 12-515, R. R. S. 1943, includes "village." By sustaining a general demurrer to plaintiff's petition, the trial court held that it did not. Plaintiff, given leave to file an amended petition, did not do so. His action was dismissed. He ap-

peals. We affirm the judgment of the trial court.

Plaintiff alleged condemnation proceedings by the defendant, Eustis Cemetery Association; that the land involved was "located within a distance of less than one mile from the corporate limits of the Village of Eustis"; that the land sought to be taken was for the purpose of an "addition to said cemetery"; and that the cemetery association was without legal authority to take the land by eminent domain. Plaintiff prayed for an injunction. Defendant demurred for the reason that the petition did not state facts sufficient to constitute a cause of action. The result has been stated above.

Plaintiff presents a question of the power of the defendant to acquire the land by eminent domain. The question of the procedure to be followed is not involved.

Plaintiff assigns as error here the sustaining of the demurrer and the dismissal of his petition.

Defendant here relies upon sections 12-201 and 12-205, R. R. S. 1943. The language involved was originally enacted in Laws 1915, Chapter 172, page 355. The act was a grant of power to "Any incorporated city or village, any incorporated cemetery association" to "secure additional lands adjoining for cemetery and burial purposes in the manner hereinafter set forth."

By its language the "act shall not apply to lands or property within the limits of incorporated cities or villages."

So far as applicable to any situation, the act was a grant of power with a prescribed procedure for securing the rights covered by the power.

Then came Laws 1951, Chapter 101, page 451. This act repealed the strictly procedural provisions of the 1915 act, leaving the 1915 act as it now appears in sections 12-201 and 12-205, R. R. S. 1943. The 1951 act sets up a uniform procedure. It was amended in the legislative process, but not as to portions here involved. The Judiciary Committee in reporting the bill said: "The purpose of this bill is to provide a uniform method

under which the power of eminent domain may be exercised.

"There are, at the present time, over thirty different methods by which various public bodies condemn private property for public use. The Legislative Council and Judicial Council both studied the subject during the past biennium. Public hearings were held. As a result, the Judicial Council adopted as a pattern one of the oldest statutes providing for condemnation, namely, that relating to acquisition of property by railroads. The Legislative Council voted to accept the bill of the Judicial Council.

"While the bill itself seems very long, the procedure is set forth in the first 24 sections of the bill. The remainder of the bill changes existing statutes on eminent domain to conform thereto.

"It is the belief of the Committee that adoption of the bill will bring about not only uniformity in procedure but a decided improvement in the method by which private property is acquired for public use."

The applicable rule is: In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon. School District No. 42 v. Marshall, 160 Neb. 832, 71 N. W. 2d 549.

It appears obvious that the 1951 act was intended to be and was a procedural bill leaving in effect the powers granted in the 1915 act, for that which is now section 12-201, R. R. S. 1943, was section 31, and section 12-205, R. R. S. 1943, was section 32 of the 1951 act.

The first sentence of what is now section 12-515, R. R. S. 1943, appears as the last sentence of Laws 1911, Chapter 27, section 1, page 176. It provided a procedure whenever it was necessary to establish or enlarge the boundaries of any cemetery, located outside of the corporate limits of "any city" and provided further that no land shall be thus taken by eminent domain either for the location of or addition to any cemetery which shall

be within one mile of the limits of "any city." Then came Laws 1917, Chapter 12, page 71, granting the power of eminent domain to cemetery associations and again referring to the boundaries outside the corporate limits of "any city." It added a proviso as to an association whose burial ground was within the corporate limits of "a city or village." Then came the act, Laws 1925, Chapter 138, page 365; and then the act, Laws 1941, Chapter 18, page 103, each of which again makes the distinction between "any city" and city "or village" that is contained in the present section 12-515, R. R. S. 1943.

We are now asked to hold that, after distinguishing between city and village in several consecutive acts, the Legislature in every instance meant to include "village" within the term "city."

It has long been the rule that: It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases. Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753.

We conclude that section 12-215, R. R. S. 1943, means just what it says—"any city"—and does not apply to a "village."

We call attention to the fact that our Constitution recognizes that "villages" and "cities" are separate and distinct. Art. III, § 18; Art. VIII, § 1; Art. XI, §§ 2, 5, Constitution. Throughout the statutes, too numerous to cite, the Legislature has granted separate and distinct powers to villages and cities of various classes, and it has established different municipal organizations and imposed different limitations of powers. To hold that "city" and "village" mean one and the same thing in this instance could only be done for compelling reasons.

They do not exist here. A contrary conclusion is clearly indicated.

Finally the plaintiff argues that in the petition he did not allege that Eustis was a village, and that the court was required to go outside the record and take notice of the fact that Eustis was a village. Twice in the petition is an allegation concerning "the corporate limits of the Village of Eustis." Plaintiff argues that this is not an allegation that Eustis is a village instead of a city. Plaintiff was given 20 days to amend his petition had he been dissatisfied with the construction the court put upon it. He did not do so. The conclusion of the trial court appears to have been a rational one as to Eustis being alleged to be a village. If the plaintiff desired to contest that conclusion, he had ample opportunity to amend his petition in such a way as to clearly present the issue. The contention does not merit further discussion.

We affirm the judgment of the trial court.

AFFIRMED.

CONNIE KAY INGERSOLL, BY OTIS A. INGERSOLL, HER FATHER AND NEXT FRIEND, APPELLANT, V. MONTGOMERY WARD & COMPANY, INCORPORATED, A CORPORATION, APPELLEE.
106 N. W. 2d 197

Filed November 25, 1960. No. 34817.

1. **Trial: Judgments.** The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.

4. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.

APPEAL from the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellant.

Baskins & Baskins, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Lincoln County by Connie Kay Ingersoll, by her father and next friend, Otis A. Ingersoll, plaintiff, against Montgomery Ward & Company, a corporation, defendant, for damages due to personal injuries alleged to have been sustained by Connie Kay Ingersoll when she caught her hand in a defective door at the defendant's store in North Platte, Nebraska, on December 12, 1957.

The defendant moved the trial court to render a summary judgment in favor of the defendant because the pleadings, answers to interrogatories, and depositions on file showed that there was no genuine issue as to any material fact, and that the defendant was entitled to a judgment dismissing the plaintiff's action as a matter of law.

The trial court sustained the defendant's motion for summary judgment and dismissed the plaintiff's petition with prejudice.

The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff perfected appeal to this court.

It is admitted that the defendant was a corporation qualified to do business in this state and that it maintained and operated a retail store at North Platte, located

in the Masonic Temple Craft Building in North Platte.

The plaintiff's amended petition alleged that the store was equipped with swinging doors constructed of plate glass; that on or before July 19, 1957, the doorchecks on the south front doors of the defendant's store were in a worn and defective condition which permitted the doors to swing rapidly from 10 to 24 inches past the closed position with great speed and force, rendering the doors unsafe and dangerous to persons passing through them; and that on or about July 19, 1957, the defendant, by its agent Walter J. Allinger, inspected the doors and discovered the defective and dangerous condition of the doorchecks. The acts of negligence charged against the defendant were as follows: In permitting the doors to remain in defective and dangerous condition for a period in excess of 140 days after the defects of the doors were discovered by the defendant; in failing to warn defendant's customers of the dangerous and defective condition of the doors and to prevent customers from using the doors while they were in such condition; and in failing to repair the doors within a reasonable time after the defective and dangerous condition of the doors was discovered.

The plaintiff's amended petition further alleged that on December 12, 1957, the plaintiff entered the store with her parents for the purpose of examining merchandise offered for sale; that thereafter the plaintiff and her parents departed from the store passing through the south front doors; that at about the time the plaintiff and her parents were leaving the store a woman entered the store through the south doors and at that time plaintiff's hand was caught between the halves of the south front doors; and that as a direct and proximate result of defendant's negligence the plaintiff suffered severe injuries.

The defendant's answer alleged that it was the duty of the owners of the Masonic Temple Craft Building to keep the doors in repair on the property occupied by

the defendant, and not the duty of the defendant to make repairs to the doors. The answer further denied all allegations of the plaintiff's amended petition not admitted.

The plaintiff's reply was a general denial of the allegations of the defendant's answer, except such as were specifically admitted.

The plaintiff assigns as error that the trial court erred in sustaining defendant's motion for summary judgment, and in overruling the plaintiff's motion for a new trial.

Before summarizing the facts in this case we deem it advisable to set forth certain propositions of law pertinent to a determination of this appeal.

The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. See, Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244; Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259; Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101; Dulansky v. Iowa-Illinois Gas & Electric Co., 191 F. 2d 881.

The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. See, Dennis v. Berens, *supra;* Sprague v. Vogt, 150 F. 2d 795. In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the Summary Judg-

ments Act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled. See, Illian v. McManaman, *supra;* Dennis v. Berens, *supra,* and cases cited therein; Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77.

In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, this court said: " 'All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury.' Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241."

The facts are presented by the depositions of Connie Kay Ingersoll, her father Otis A. Ingersoll, her mother Esther Ingersoll, Carlie Andre, Walter H. Kohn, manager of the defendant's store in North Platte, and certain interrogatories and the answers thereto.

For convenience we will refer to Connie Kay Ingersoll as Connie, to her father as Otis, to her mother as Esther, and to Walter H. Kohn as the manager.

The manager of the store testified that he had served in that capacity for a period of 1 year and 8 months.

A superintendent's inspection report of the defendant's store prepared by Walter J. Allinger on July 19, 1957, is in the record. The first paragraph of the report reads as follows: "The Rixson door checks on two of the glass entrance doors are worn out of (sic) should be replaced. These doors swing from 10" to 24" past closed position when released and no further adjustment could be made."

Another exhibit titled "Public Accident Report" was made by the manager of the store and bears his signature. This report was written in longhand and reads as

follows: "Mother says that Connie was following her father out door but dallied behind to look at something, then Connie caught edge of one door, and a woman coming in the other door, released it and the two doors came together and cut off first joint, 2nd and 3rd fingers of left hand."

There were certain interrogatories propounded by the plaintiff to the defendant. The most pertinent questions and answers appearing therein are as follows: Question 10. "Were any repairs made or started upon the south front doors of the retail store in North Platte, Nebraska between August 5, 1957 and December 12, 1957?" Answer. "No." Question 14. "What was the defect in the south front doors of the retail store in North Platte, Nebraska?" Answer. "The door checks were worn." Question 27. "Was Montgomery Ward & Company in exclusive possession and control of the interior of the ground floor building located at 5th and Dewey Streets in North Platte, Nebraska, in which it was maintaining and operating a retail store December 12th, 1957?" Answer. "Yes." Question 28. "Was W. H. Kohn in sole and complete charge of the premises on behalf of Montgomery Ward and Company * * * subject to supervision only by a superior or superiors located some place other than North Platte, Nebraska, on December 12th, 1957?" Answer. "Yes."

There was a letter dated February 12, 1958, to the Masonic Temple Craft, Inc., attention of Wilfred C. Boldt, relating to the accident of December 12, 1957, calling attention to the injuries received by Connie on that date, and in which it was stated: "It is our understanding of the accident that the cause was the fact that the door checks were not working. This condition was called to your attention on August 5, 1957 by Mr. Vogt of Wards Real Estate Department and again verbally on or about December 5, 1957 by the Store Manager."

The record shows that Otis, his wife Esther, and

Connie went to North Platte on December 12, 1957, and entered the defendant's store about noon of that day for the purpose of looking at merchandise. They stayed in the store approximately 5 minutes. Otis testified that his wife went out the door first, he followed her, and Connie was a step or two behind him. Connie screamed, and he turned and observed that the ends of her fingers were cut off. He further testified that he did not see the accident happen; that only one lady saw the accident; that he did not know how Connie got her fingers in the door; that the lady coming from the south who entered the store let go, and both doors were very free and "swung completely without any hesitation or stoppage whatsoever" past the center stopping point; and that he was holding the door open when the lady coming from the south entered into the door, and when she let her door go is evidently when Connie's fingers were cut off.

Connie testified that she did not remember how the accident happened. At the time her deposition was taken she was 9 years of age. She further testified that the doors were both closed until her mother pushed the door open.

Esther testified that she did not see what happened, but noticed the lady coming into the store as they were going out; that when Connie screamed the lady was probably well within the store; that there were a lot of people there; and that she did not have any idea who the lady who entered the store was, but she did remember seeing her enter the store and let loose of the door.

Carlie Andre testified that at the time the accident happened she was a little bit south of the south entrance of the store, going north; that she was not close enough to see Connie's hand caught in the door, but was close enough to see her parents out on the sidewalk, and to hear the door come shut with a thud and Connie scream; that she saw Connie's father come running back toward

her; that people were coming and going, and she walked toward the door but did not go inside; that she noticed the little stubs of Connie's fingers and blood spattered on the floor 4 or 5 feet inside the door; and that she did not actually see the accident.

We believe there is a genuine issue of fact that exists in this case as to whether or not Connie lost her fingers by virtue of the defective condition of the doors in the building occupied by defendant, whether or not the defendant was negligent in failing to have the defective condition of the doors corrected, and that the defendant had notice of the defective condition of the doors for more than 140 days.

Under the authorities heretofore cited, we conclude that the trial court was in error in rendering a summary judgment in favor of the defendant.

For the reasons given herein, we reverse the judgment and remand the cause for trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

A. F. KEHR, REAL AND TRUE NAME, ALBERT F. KEHR, REVIVED IN NAME OF ROBERT KEHR, EXECUTOR OF THE ESTATE OF A. F. KEHR, DECEASED, ET AL., APPELLEES, V. HERB BLOMENKAMP ET AL., APPELLEES, IMPLEADED WITH UNIVERSAL SURETY COMPANY, A CORPORATION, APPELLANT.
106 N. W. 2d 179

Filed November 25, 1960. No. 34838.

1. **Liens.** The existence of a lien securing an original loan furnishes a presumption that a renewal was not a discharge of the original lien where the renewal is not secured.
2. **Bills and Notes.** The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.

APPEAL from the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Firmin Q. Feltz, for appellant.

McGinley, Lane, Shanahan & McGinley, for appellees Kehr.

A. Paul Johnson, for appellee Melville Inv. Co.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This action, as originally instituted, was one by A. F. Kehr, real and true name, Albert F. Kehr, plaintiff, against Herb Blomenkamp and L. Marguerite Blomenkamp, husband and wife, Universal Surety Company, a corporation, and J. H. Melville Lumber Company, a corporation, defendants, to foreclose a mortgage on certain real estate given on February 16, 1955, by the defendants Blomenkamp to the plaintiff to secure the payment of a promissory note of even date therewith for $15,000 on which there was a balance due which was represented and evidenced by a promissory note in the amount of $8,000, given by the defendants Blomenkamp to the plaintiff as of June 1, 1956.

J. H. Melville Lumber Company, a corporation, was made a party defendant by reason of the fact that the defendants Blomenkamp had given to it a mortgage on the same real estate on November 14, 1956. This mortgage was assigned to Melville Investment Company, a partnership, thus causing the partnership to become a substitute defendant.

Universal Surety Company, a corporation, was made a party defendant by reason of the fact that the defendants Blomenkamp had given to it a mortgage on the same real estate on December 3, 1956.

The Universal Surety Company filed an answer and cross-petition. By the answer it denied the validity of the mortgage which the plaintiff sought to foreclose. By the cross-petition it denied the validity of the mortgage of the Melville Investment Company, repeated its

denial of the validity of the plaintiff's mortgage, and sought a foreclosure of its own mortgage as a first lien on the real estate. There is much more contained in these pleadings but for reasons which will become apparent a further statement thereof is not of importance herein.

The Melville Investment Company filed an amended answer and cross-petition, a statement of the contents of which is not required herein except that in them it is contended that the lien of its mortgage has priority over the mortgage of Universal Surety Company.

The case was tried to the court and a decree was rendered foreclosing the mortgage in accordance with the prayer of the plaintiff. The mortgage of the plaintiff was adjudged a first lien; the mortgage of the Melville Investment Company, a second lien; and the mortgage of the Universal Surety Company, a third lien.

A motion for new trial was duly filed by defendant Universal Surety Company. This motion was overruled but before that was done revivor in the names of Robert Kehr, executor of the estate of A. F. Kehr, deceased, May Kehr, Robert Kehr, Ruth Gile, Stella May Fritzler, and Mildred Williams, heirs at law of A. F. Kehr, plaintiffs, was ordered on account of the fact that A. F. Kehr, the original plaintiff, had died.

An appeal was duly taken from the decree and the order overruling the motion for new trial by the defendant Universal Surety Company, which will hereinafter be referred to as the appellant. The Melville Investment Company did not appeal and of course is here as an appellee. The defendants Blomenkamp did not appeal and they have made no appearance in this court. It is also true that they made no appearance in the case in the district court.

The brief of the appellant contains assignments of numerous grounds on which it contends it is entitled to have the decree of the district court reversed. On a determination of one of these depends the question of

whether or not the others require consideration herein. That one is as follows: "The court erred in finding that plaintiff had a first lien on real estate involved herein."

The court adopted the theory of the plaintiff and in effect found and decreed that the mortgage given to the plaintiff by the defendants Blomenkamp on February 16, 1955, to secure the $15,000 note of even date thereof remained as security for the note for $8,000 given as of June 1, 1956, and as such was a first lien on the real estate. The further effect of the theory was that the note for $8,000 was a renewal note for the balance due on the other note, in consequence of which the obligation and security of the mortgage remained in full force and effect.

The appellant on the other hand contends that the note for $8,000 was a new obligation and transaction which was not secured by the mortgage.

The principles of law on which this question must be determined were stated early in the decisions of this state. There has been no departure from the early statements. In Davis v. Thomas, 66 Neb. 26, 92 N. W. 187, it was said: "Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing the original loan, furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured."

This principle was approved in Auld v. Walker, 107 Neb. 676, 186 N. W. 1008. The following was also said in this case: "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt."

In Berwyn State Bank v. Swanson, 111 Neb. 141, 196 N. W. 125, these principles were approved in the following words: "But, whatever the rule may be in other jurisdictions, it is well settled in this state that—'The taking of a new note for an existing note is a re-

newal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.'" See, also, City Nat. Bank v. Denslow, 114 Neb. 600, 209 N. W. 254; Mettlen v. Sandoz, 131 Neb. 625, 269 N. W. 98.

By what was said in these cases it is clear that the specific agreement that a new note will extinguish the original debt must be one between the parties to the transaction.

In the record before this court there is no evidence either direct or circumstantial in proof of a specific agreement between the plaintiff and the defendants Blomenkamp that the note for $8,000 should or would extinguish the original debt.

This lack of evidence renders applicable and controlling in this case the unvaried rule that the existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original where the renewal is not secured, the effect of which is to say that the contention of the appellant that the mortgage was released is presumptively without merit. This coupled with the absence of any evidence of a specific agreement that the note for $8,000 extinguished the original debt makes it clear that the contention of the appellant that the decree of the district court was erroneous is without merit.

While it does not appear necessary to go further on the question of whether or not the parties to the $15,000 note and mortgage and the $8,000 note regarded and treated the transaction as to the $8,000 as a renewal, it appears expedient to refer to the evidence relating thereto. This evidence in its entirety in purport and effect negatives any intent of the parties to extinguish the original debt and supports the position that the $8,000 was in renewal of the obligation of the other note.

In answer to a set of interrogatories submitted by the plaintiff to the defendants Blomenkamp it was stated in

substance that it was the intention that the mortgage should remain as security for the $8,000 note.

The note for $15,000 was introduced as evidence. On its back appeared in the handwriting of L. Marguerite Blomenkamp the following: "Nov. 15, 1955—$7000.00 June 1956 Renewal note $8000.00." Below this appeared the following: "Paid June 4, 1956 A. F. Kehr." The answer of the defendants Blomenkamp to an interrogatory is that these endorsements were placed on the back of the note the day that the plaintiff marked payment.

In response to a letter written to the defendant Herb Blomenkamp it was stated that the $7,000 was paid on November 15, 1955, and a renewal note for $8,000 was given on June 1, 1956.

There is no competent evidence to the contrary. There is an affidavit in the record made by the attorney for the appellant the pertinent gist of which is a deduction and conclusion of the affiant that the endorsement on the back of the note made by L. Marguerite Blomenkamp was made after the $8,000 note was executed and after the $15,000 note had been returned, whereas the only evidence in the record is that it was made at the same time.

Whether or not what the defendants said as to the time of the endorsements is true may not be regarded of any controlling importance. It cannot in anywise be evidence to overcome the presumption that a renewal was intended or as evidence in proof of a specific agreement between the parties that the new note extinguished the original debt.

The assignment of error quoted herein is without merit. This conclusion renders unnecessary a consideration of the other assignments. The decree of foreclosure and the allocation of priority of liens was correct. The mortgage of the appellant is by its terms subject to that of the plaintiff and of the Melville Investment Company. On its face and as a part thereof

it is stated that it is "subject to prior mortgages of record." The other two are prior mortgages of record.

The judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOHNSON FRUIT COMPANY, A CORPORATION, PLAINTIFF, V. ROSCOE STORY, AS COUNTY ASSESSOR OF ADAMS COUNTY, NEBRASKA, ET AL., DEFENDANTS.

106 N. W. 2d 182

Filed November 30, 1960. No. 34835.

1. **Statutes: Penalties.** A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.
2. ———: ———. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
3. **Statutes.** Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former.
4. ———. Where the later of two statutes passed at the same session of the Legislature does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands.
5. **Taxation.** Section 77-413, R. S. Supp., 1959, construed and held applicable to a situation where a taxpayer fails to make a return of personal property subject to taxation or omits taxable property from his return, and unapplicable to a voluntary return made later than the time fixed by statute.
6. **Taxation: Penalties.** A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting taxable property from his return may not properly question the constitutionality of the act.

Original action. *Demurrer overruled.*

Stiner & Boslaugh, for plaintiff.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendants.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

CARTER, J.

This is an original action for a declaratory judgment brought by the plaintiff Johnson Fruit Company praying for an injunction against the defendants the county assessor and county treasurer of Adams County, Nebraska, and the state Tax Commissioner of Nebraska. The defendants filed a general demurrer to the petition. The issue is, therefore, whether or not the petition states a cause of action entitling the plaintiff to the relief sought.

The petition alleges that the plaintiff is a corporation with its principal place of business in Hastings, Adams County, Nebraska. On January 1, 1960, the plaintiff was the owner of intangible personal property, Classes A and B, having the fair market value of $327,371. Plaintiff, without having applied for or obtained an order extending the time for filing its personal property tax return, filed with the county assessor of Adams County a personal property tax return and two supplemental personal property tax returns on March 7, March 11, and March 30, 1960, thereby disclosing and reporting all the intangible personal property owned by it on January 1, 1960, and the fair market value thereof.

The petition also alleges that the defendants or any of them did not on or prior to March 30, 1960, examine or check any personal property tax returns for the purpose of determining whether or not the plaintiff had failed to return its property for taxation for the year 1960, or investigate, examine, or inspect any property of the plaintiff for that purpose, or examine the plaintiff, its officers or agents, as to its property, or make

any finding that any personal property of the plaintiff was not returned for taxation for the year 1960. In other words, the petition alleges that the plaintiff voluntarily returned all of its intangible personal property for taxation, although beyond the time fixed by the statute for so doing.

The petition further alleges that the defendants, unless enjoined, will find that plaintiff failed to return its intangible personal property for the year 1960 and will compute the penalty for such claimed failure and omission pursuant to section 77-413, R. R. S. 1943, as amended by L. B. 51, 1959, now section 77-413, R. S. Supp., 1959. The plaintiff contends that the foregoing section has no application to a situation where a full and complete return of intangible personal property has been made, although filed beyond the time fixed by law for so doing. The defendants contend that the penalties provided in section 77-413, R. S. Supp., 1959, apply to a filing of a return of intangible personal property for tax purposes beyond the time fixed by statute for so doing, even though the late filing constitutes the only failure of compliance on the part of the plaintiff.

The pertinent part of section 77-413, R. S. Supp., 1959, provides: "If the county assessor from examining and checking the returns of the personal property, the investigation, examination and inspection of property of the taxpayer and from the examination of the taxpayer under oath as to his books, records and papers shall find that any personal property, either tangible or intangible, was not returned for taxation for the year 1959 or for any taxing period thereafter, he shall compute the tax for the year or years during which the payment of taxes on personal property was avoided, and the interest and penalties, in the manner following: (1) Any intangible property omitted and not returned commencing with the year 1959, or omitted or not returned for any year thereafter, shall be placed upon the tax rolls and taxed at the same rate as would have been

imposed had it been properly returned for taxation, and to such tax shall be added a penalty computed by multiplying the actual value of such omitted or not returned property by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing districts in which such property should have been returned; * * *."

The foregoing section is clearly a penalty statute which must be strictly construed. Its import may not be extended by construction. Such a statute may not be applied to situations or parties not fairly or clearly within its provisions. In construing such a statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give the statute full operation. State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446; Macomber v. State, 137 Neb. 882, 291 N. W. 674; 50 Am. Jur., Statutes, § 388, p. 404.

Applying the foregoing rule of construction to section 77-413, R. S. Supp., 1959, it is plain that the penalties contained in that section apply to situations where the county assessor, from examining and checking the returns of personal property, or from investigation, examination, and inspection of the personal property of the taxpayer, or from the examination of the taxpayer under oath as to his books, records, and papers finds that personal property was not returned for taxation. In other words, in the language of plaintiff's counsel contained in its brief, such section of the statute applies where personal property was "smoked out" for taxation purposes by the efforts of the taxing authorities. We concur with this view. It has no relation by its terms to voluntary returns of personal property which were filed beyond the time fixed by the statute for so doing.

By the demurrer the defendants admit that all of plaintiff's property was returned for taxing purposes

for the year 1960. No property was omitted or not returned for the year 1960, and consequently no basis existed for the assessment of a penalty under section 77-413, R. S. Supp., 1959. The factual situation set out in plaintiff's petition does not bring it within the scope of the 1959 act and it is not therefore subject to the penalties provided by that statute.

The defendants assert that section 77-413, R. S. Supp., 1959, in effect repeals section 77-1235, R. S. Supp., 1959, and if this be so, the construction we have given to section 77-413, R. S. Supp., 1959, would create a void in that no penalty for filing a personal property tax return after the time fixed by statute for so doing would exist. It is not disputed that the 1959 amendment as contained in section 77-413, R. S. Supp., 1959, was passed by the Legislature subsequent to the 1959 amendment to section 77-1235, R. R. S. 1943, now found in section 77-1235, R. S. Supp., 1959. We do not deem it necessary to determine if the amendment to section 77-413, R. R. S. 1943, as contained in section 77-413, R. S. Supp., 1959, was void for failure to comply with the Nebraska Constitution for reasons hereafter stated. We shall consider the present case on the theory that the 1959 amendment to section 77-413, R. R. S. 1943, was valid insofar as the Constitution is concerned.

Section 77-1235, R. S. Supp., 1959, provides: "In every case where any person shall fail, neglect or refuse to make out and deliver to the county assessor, or any of his assistants, the statement of all personal property which he is to list required under section 77-1229, or as required by any other law, the county assessor shall proceed to assess the number and description of the several enumerated articles of property and shall add to the value thereof fifty per cent." It cannot be logically questioned that the penalty provided by that section of the statute applies to situations involving late filings of personal property returns for taxing purposes as well as in cases where no return was made or

where property was omitted from a return made. The use of the words "where any person shall fail, neglect or refuse" to make and deliver to the county assessor the statement of all personal property subject to taxation plainly sustains such conclusion. In section 77-413, R. S. Supp., 1959, the Legislature did not use the word "neglect" and limited the application of the amendment to property not returned or omitted from the return made, and the increased penalties were clearly limited to such situations.

Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former. State v. Omaha Elevator Co., 75 Neb. 637, 106 N. W. 979; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366. It is clear therefore that, assuming the constitutional validity of both statutes, the later amendment in point of time was intended only as a partial repeal of the former. In other words, section 77-413, R. S. Supp., 1959, purports to increase the penalty for failing to return or omitting from a return personal property subject to taxation. It was clearly the intention of the Legislature to increase the penalty for such failures and not to amend section 77-1235, R. S. Supp., 1959, as it applied to returns of personal property belatedly made and delivered to the taxing authorities. The amendments so construed are harmonious and give effect to each. State v. Omaha Elevator Co., *supra*. The contention advanced by the defendants that the amendment contained in section 77-413, R. S. Supp., 1959, enacted later in point of time than the amendment contained in section 77-1235, R. S. Supp., 1959, was intended as a complete repeal of section 77-1235, R. S. Supp., 1959, is not well taken. In any event, since a penalty statute is to be strictly construed, the courts will not interpolate words omitted by the Legislature or extend the language used by implication under such circumstances

as we have here. The court must assume that the Legislature intended to do what it did in dropping the word "neglect" and its connotations from section 77-413, R. S. Supp., 1959. If the Legislature had intended section 77-413, R. S. Supp., 1959, to apply to personal property returns filed after the time fixed by statute, it would have been a simple matter to have said so in appropriate language. Cogent reasons exist why the increased penalties should apply to property omitted or not returned, and not apply to returns of personal property filed out of time. We must assume that the Legislature was cognizant of such reasons and intended to exclude from the increased penalties the taxpayers who voluntarily made their personal property returns to the assessor beyond the time fixed by statute. We are of the opinion that if we were to adopt the interpretation advanced by the defendants, the court would be increasing the scope of section 77-413, R. S. Supp., 1959, and thereby subject a class of taxpayers to the increased penalties provided in the act who were not intended by the Legislature to be included within its scope.

A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation, or for omitting taxable property from his return, may not properly question the constitutionality of the act.

Plaintiff is entitled to a judgment declaring, under the facts contained in the petition, that section 77-413, R. S. Supp., 1959, is not applicable to the plaintiff and, if the taxing authorities seek to apply the penalties contained in such statute under the pleaded facts, an injunction affords a proper remedy. The demurrer of the defendants is overruled and defendants given 20 days to answer.

DEMURRER OVERRULED.

GENEVIEVE R. CREIGH, APPELLEE, V. RICHARD R. LARSEN, STATE TREASURER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS, L. I. MCGOWAN, INTERVENER-APPELLEE.

106 N. W. 2d 187

Filed November 30, 1960. No. 34892.

1. **Taxation: Penalties.** Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax.
2. ———: ———. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith.
3. ———: ———. Since the imposition of a penalty is not the assessment of a tax, Article VIII, section 1, of the Constitution has no application thereto.
4. **Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
5. **Taxation.** Taxpayers who fail to return property for taxation may properly be designated by the Legislature as a class for the purpose of enacting legislation dealing with their failure to return property for taxation.
6. **Taxation: Penalties.** Sections 77-702 and 77-703, R. R. S. 1943, provide a state-wide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state.
7. ———: ———. Under such a statute with a state-wide uniform tax a provision of statute imposing a penalty computed by multiplying the actual value of property not returned by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing district in which such property should have been returned, such tangible rate being substantially different in the various taxing districts of the state, is not uniform as to class and discriminatory among members of the class.
8. **Constitutional Law: Taxation.** L. B. 51 and section 2 of L. B. 42, Laws 1959, now sections 77-413, 77-716, and 77-318, R. S.

Supp., 1959, not being uniform as to class and being discriminatory among members of the class, are violative of Article III, section 18, and Article I, section 25, Constitution of Nebraska, and wholly void.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton, John J. Hanley, John C. Burke, Edward M. Stein,* and *Wm. Ross King,* for appellants.

Thomas P. Leary, for appellee.

McGowan & Troia and *Ross & O'Connor,* for intervener-appellee.

Raymond G. Young, Kenneth B. Holm, Keith Miller, and *Edmund D. McEachen,* amici curiae.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

CARTER, J.

This is a class action brought by the plaintiff on behalf of herself and others similarly situated against the State Treasurer, the state Tax Commissioner, the county treasurer of Douglas County as such and as the treasurer ex officio of the City of Omaha and the School District of Omaha, the county assessor of Douglas County, the County of Douglas, the City of Omaha, and the School District of Omaha.

The record shows that the state Tax Commissioner reported to the county assessor of Douglas County certified stocks owned by the plaintiff which were not listed for taxation. The assessor on July 28, 1959, valued the stock at $1,455 which was taxed at the Class B intangible tax rate amounting to $5.82 and imposed a penalty by multiplying the value of the stock by the total tangible rate in the city of Omaha of 64.05 mills, which resulted in a penalty of $93.19. It is the contention of the plaintiff that L. B. 51 and L. B. 42, Laws 1959, now

cited as sections 77-413, 77-716, and 77-318, R. S. Supp., 1959, on the authority of which the penalty was imposed, are unconstitutional and void. The trial court held the foregoing sections of the statute to be violative of the Constitution, and the defendants have appealed.

Plaintiff asserts that the foregoing acts of the Legislature offend several provisions of the state Constitution. We shall deal only with the provisions of the Constitution necessary to the determination of the case. It is first contended that the acts are violative of Article VIII, section 1, Constitution, relating to uniformity in the levying of taxes. Plaintiff also advances the contentions that the questioned acts are special laws violating the requirements of uniformity inhibited by Article III, section 18, Constitution, and discriminatory between taxpayers of the class contrary to Article I, section 25, Constitution, generally referred to as the equal protection clause.

The acts before us deal with the collection of taxes on intangible personal property not reported for taxation and the penalties to be assessed for omitting such property from the tax return. We point out that under the provisions of sections 77-702 and 77-703, R. R. S. 1943, Class A intangible property is assessed at the rate of $2.50 per $1,000 of value and Class B intangible property is assessed at $4.00 per $1,000 of value. The tax is state-wide and uniform in its operation wherever taxed. The penalties imposed by the questioned acts for failure to return intangible property for taxation provide generally that the penalty shall be computed by multiplying the actual value of such omitted or not returned property by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing districts in which the property should have been returned.

The rate of taxation on tangible property varies throughout the taxing districts of the state in accordance with the aggregate needs of the taxing bodies of such districts. Admittedly, similar mill levies in amount

are the exception rather than the general rule. The effect of the penalty provisions of section 77-413, R. S. Supp., 1959, and the other acts under consideration as well, is to produce substantially different penalties on the same value of intangible property in the different taxing districts of the state. As an example, the normal tax on the Class B intangible property omitted by plaintiff from her return is $5.82. The penalty imposed was $93.19, based on the total tangible tax rate of 64.05 mills where she was assessed. The record discloses that the total levies in the various school districts in Douglas County vary from a high of 80.02 mills in Valley to a low of 28.26 mills in School District 23. If plaintiff lived in Valley the penalty would have been $116.43; if she lived in School District 23 it would be $41.12. In Valley the penalty for failing to list a bank account, Class A intangible, is 3200 percent of the amount of the tax; in School District 23 the penalty is 1130 percent of the tax. In Omaha the penalty for failure to list a Class B intangible is 1600 percent. It is the contention of the plaintiff that the penalty provisions of the statutes under attack are wanting in uniformity and are void under the provisions of Article VIII, section 1, of the Nebraska Constitution; that they are special legislation resulting in a want of uniformity of operation inhibited by Article III, section 18, of the Constitution; and that they are discriminatory and violate Article I, section 25, of the Constitution, the equal protection clause.

The Legislature has broad powers in dealing with the subject of taxation, and its general power to provide penalties to procure the return of property for assessment and to coerce the payment of taxes properly assessed, when related to legitimate purposes, is limited only in that such penalties must not be oppressive or unreasonable. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A. L. R. 1386. It cannot be logically disputed that the formula for assessing penalties under the questioned statutes results in total want of uniformity in

their application. A penalty in a tax statute is an exaction which imposes a liability upon those who fail to comply with the tax laws in the respects set forth. The question before the court resolves itself into the question of whether or not a statute imposing penalties must comply with constitutional provisions requiring uniformity, inhibitions as to the enactment of special laws, and be nondiscriminatory under the equal protection clause.

The general rule is: " 'The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.' " State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N. W. 2d 302, 144 A. L. R. 138. See, also, Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317. We do not question the fact that taxpayers who do not return taxable property, or who omit taxable property from their return, constitute a reasonable classification for purposes of legislation concerning their failure to return their property for taxation. It is plain from what we have heretofore set out that the law does not operate uniformly and alike upon every member of the class designated and that it discriminates between taxpayers for identical violations of the taxing statutes.

It is the contention of the defendants that penalties imposed on a taxpayer for failures in the reporting of property for taxation are not a part of the tax and are not subject to the constitutional requirements of uniformity or the general inhibitory provisions of the Constitution. In this respect this court has held that a penalty imposed for not reporting taxable property, or the failure to report the same within the statutory

period, or a failure to pay the tax assessed within the time fixed by law, is no part of the tax. Steinacher v. Swanson, *supra;* Tukey v. Douglas County, 133 Neb. 732, 277 N. W. 57; School Dist. of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24. Consequently, the imposition of a tax penalty is unrelated to Article VIII, section 1, Constitution, providing that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises and uniform as to class on all other property. The defendants rely largely upon Tukey v. Douglas County, *supra,* to support their contention. We point out that the issue in that case was whether or not uniformity of operation was required by a statute which provided for the waiver or remission of a penalty, a matter wholly unrelated to a statute imposing a penalty. In that case we said, quoting from Steinacher v. Swanson, *supra:* "We are aware that some authorities hold that constitutional requirements as to uniformity of operation do not apply to statutes providing for a waiver or remission of a penalty. Penalties, including interest and costs, are generally considered punitive in their nature and a statute remitting them is one of grace to which the question of uniformity has no application." In the present case the statute is clearly punitive as to taxpayers within its terms, and to some extent compensatory to the state, but it is in no sense of the term an act of grace, the controlling factor in the Tukey case. Neither the Tukey case, nor any other that we have been able to find, holds that the Legislature may ignore the rule of uniformity in the imposition of penalties required generally in all legislation enacted by it. We point out that there is no constitutional provision which prohibits a waiver or remission of penalties by general law such as we had before us in the Tukey case, although it was not an issue in that litigation. The Constitution does prohibit a waiver or remission of penalties by a local or special law as specifically provided in Article

III, section 18, whether or not the act be one of grace.

It is also contended by the defendants that the legislative acts presently before us are no less discriminatory nor any less wanting in uniformity than in the case of tangible property where the penalties imposed vary with the different mill levies in the various taxing districts in the state. We point out that the rate of taxation on Class A and Class B intangible property is uniform throughout the state and consequently the magnitude of the offense for not returning or omitting intangible property is identical in each taxing district of the state. On the other hand, the magnitude of the offense in the case of tangible property is dependent upon the valuation of such property and the mill levy made in each taxing district of the state. The penalty imposed on one who failed to return or who omitted tangible property bears a relation to the magnitude of the offense when the statute provides a penalty based on a percentage increase of the value of the property or of the tax levied upon it. But the application of the tangible rate to intangible property has no reasonable relation to the magnitude of the offense where the intangible rate is uniform throughout the state. It discriminates between members of the established class in that it produces varying penalties for identical offenses among members of the class. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408; Webster v. Williams, 183 S. C. 368, 191 S. E. 51, 111 A. L. R. 1348; State ex rel. Mitchell v. Mayo, 15 N. D. 327, 108 N. W. 36.

It is clear to us that L. B. 51 and section 2 of L. B. 42, Laws 1959, now cited as sections 77-413, 77-716, and 77-318, R. S. Supp., 1959, are discriminatory between members of a class contrary to Article I, section 25, and nonuniform in their operation contrary to Article III, section 18, Constitution of Nebraska.

The conclusion at which we have arrived makes it unnecessary to pass on other asserted grounds of un-

constitutionality, to wit: Article I, section 15, providing that all penalties shall be proportionate to the nature of the offense; Article I, section 3, relating to due process; and Article III, section 14, relating to amendments.

The trial court found the questioned statutes to be unconstitutional and void for the foregoing reasons, and others as well. For the reasons stated, the decision of the district court is correct and its judgment is therefore affirmed.

AFFIRMED.

MILES W. JOHNSTON, APPELLEE, V. ARTHUR J. L. ROBERTSON ET AL., APPELLANTS.
106 N. W. 2d 192

Filed December 2, 1960. No. 34804.

1. **Trial.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts.
3. ———. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
4. **Trial: Appeal and Error.** It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
5. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

W. L. Dwyer, for appellants.

William M. Grossman, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Lancaster County by Miles W. Johnston, plaintiff, against Arthur J. L. Robertson and Laversa Mae Robertson, defendants, to recover on an alleged contingent fee contract for services rendered to the defendants in recovering certain real estate in Lincoln, Nebraska, for the defendants. The case was tried to a jury resulting in a verdict in favor of the plaintiff in the amount of $500. The defendants moved the court for a directed verdict at the close of plaintiff's evidence and at the conclusion of all of the evidence. These motions were overruled. The defendants filed a motion to set aside the verdict of the jury and the judgment on the verdict, and to enter judgment for defendants on the ground that the evidence was insufficient to sustain a verdict in the plaintiff's favor. The defendants filed an amended motion to set aside the verdict and enter judgment for the defendants notwithstanding the verdict on the ground that the evidence was insufficient to sustain a verdict for the plaintiff. Both of the above motions were overruled. The defendants appealed.

For convenience we will refer to the plaintiff Miles W. Johnston as plaintiff; to Arthur J. L. Robertson and Laversa Mae Robertson as Robertsons or defendants; to Richard D. Ferguson and Sophia R. Ferguson as the Fergusons; and to Dean E. Welch and Gladys Welch as the Welches.

The pleadings necessary to consider are as follows.

The plaintiff alleged that the reasonable value of the

property recovered was $6,000; that the defendants agreed to pay plaintiff one-third of the value of the recovery made by plaintiff if suit was required; that the plaintiff recovered said property for the defendants; that he was entitled to recover $2,000 from the defendants for his fee but that notwithstanding his entitlement he billed the defendants for and agreed to accept $1,500 in full for his services; that the defendants paid $200 of said amount; and that there was due and owing to the plaintiff from the defendants the sum of $1,300, for which amount he prayed judgment.

The defendants by their answer admitted that they retained the plaintiff to represent them to recover the possession of certain real estate described in the plaintiff's petition. The defendants alleged that they had a claim against the Fergusons, the persons who were wrongfully in possession of the property as described in the plaintiff's petition, in the sum of $2,325 for rent from January 1, 1957; that it was agreed between the plaintiff and these defendants that the plaintiff was to receive as his fee for services one-third of the sum recovered as rents in said action; that if he was unsuccessful in recovering a money judgment for rent, he was to receive the sum of $250 for his services in dispossessing the Fergusons of said real estate; that for some reason unknown to the defendants, the plaintiff abandoned the cause of action for rents and insisted that the defendants settle the case by taking possession of the real estate, and the action was so disposed of; that these defendants paid the sum of $200 on the fee of plaintiff for services rendered; and that they owed him the sum of $50 which amount they had tendered into court in full payment of the plaintiff's fee. The prayer was that the plaintiff's petition be dismissed.

The plaintiff's reply to the answer of the defendants denied each and every allegation therein contained which did not admit allegations of the plaintiff's petition.

It might be stated that the defendants filed a cross-

petition and the plaintiff filed an answer thereto which need not be set out.

The sole question presented on this appeal is whether or not the trial court erred in overruling the motions of the defendants, made at the close of the plaintiff's case in chief and again at the close of all of the evidence, for directed verdict and for judgment notwithstanding the verdict.

Before summarizing the evidence in this case, we set forth the following rules of law as being applicable.

"A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. * * * The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the evercise of its function as the trier of the facts." Harris v. Pullen, 169 Neb. 298, 99 N. W. 2d 238.

It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain a verdict, admissible testimony tending to support the case of the successful party should be accepted as the truth. See Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. See Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

It has long been the rule that where different minds

may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. See Snyder v. Farmers Irr. Dist., *supra*.

The record discloses that on October 18, 1947, the Robertsons purchased Lots 1, 2, 3, 10, 11, and 12 in Block 7, Second Addition to Normal, now a part of Lincoln, Nebraska, obtaining a warranty deed from Fred C. Wick and his wife Martha. The property involved in this case is described as Lots 10, 11, and 12 in Block 7, as above described, and is also known as 5540 Saylor Street.

On November 3, 1947, the Robertsons mortgaged the above-described property to the Woodmen Accident Company, the consideration being $4,850.

On November 24, 1954, the Robertsons, by articles of agreement, agreed to sell to the Welches the property here involved for $7,250, $400 cash in hand, $900 cash at time of closing on or before December 4, 1954, and the sum of $70 per month commencing with payment January 1, 1955, and like payment the first of each month thereafter, with interest at 6 percent per annum. It was also agreed that in the case of a default in payment of principal or interest for a period of 30 days the contract could be forfeited as well as the payments made thereon. Upon the execution of the contract, the Robertsons were to execute a warranty deed to be placed in escrow with the Union Bank of Lincoln, Nebraska, to be delivered to the Welches on completion of the contract.

On November 7, 1955, the Welches gave a quit claim deed to the property here involved to Clara B. Marr, the mother-in-law of Dean E. Welch. The consideration in the deed was one dollar.

On November 25, 1955, the Welches entered into a written agreement to sell the property here involved to the Fergusons for the sum of $9,000, $800 to be paid on the execution of the contract and the balance of

$8,200 to draw interest at the rate of 6 percent per annum, and the sum of $75 to be paid each month commencing January 1, 1956, until the total sum of $8,200 was paid. This contract provided that if the Fergusons would default the payments for the monthly installments or any part thereof when due, or fail to perform any of the terms of the contract, the Welches could cancel the contract. The contract further provided that the Welches agreed to furnish the Fergusons an abstract which would show that the Welches were vested with merchantable title to such real estate, and that upon tender by the Fergusons of the balance of the purchase price, together with the payment of interest as provided for in the contract, the Welches agreed to execute and deliver to the Fergusons a warranty deed conveying such property free and clear of all encumbrances.

On December 9, 1955, Robertson wrote a letter to the Welches stating that it was all right for the Welches to sell their equity in the property, and to send the necessary papers and the Robertsons would execute the same if the client's credit rating was all right. This letter also acknowledged a December payment from the Welches under the contract. The Robertsons did not execute any instruments relating to the sale of this property from the Welches to the Fergusons.

The Welches defaulted in their payments under the contract with the Robertsons on or about January 1, 1957. Thereafter Dean E. Welch filed bankruptcy proceedings in the State of Washington. In consideration of the sum of $125 paid to the trustee in bankruptcy of the bankrupt's estate, a quit claim deed to the property here involved was made to Robertsons. The deed was given in lieu of foreclosure and forfeiture of the contract between the Robertsons and the Welches, the trustee in bankruptcy disclaiming any interest in said property.

After the Welches were in default of their payments under the contract with the Robertsons, the Robertsons

employed counsel to obtain possession of the property, but subsequently dismissed such counsel. On July 8, 1958, the Robertsons employed the plaintiff to represent them. They were without funds and, as a consequence, a contingent fee arrangement was made. The plaintiff testified that he told the Robertsons he would take the matter on the basis of one-third of the recovery if he had to file suit, however, if he could settle the matter without suit and get the Robertsons possession of the property, his fee would be one-fourth of the recovery. Suit in ejectment was filed in the district court for Lancaster County on July 29, 1958, titled Arthur J. L. Robertson et al., plaintiffs, v. Richard D. Ferguson et al., defendants. Appearance for the defendants was made in this matter, and the cause was continued.

The action in ejectment was obviously brought under the provisions of section 25-2124, R. R. S. 1943.

The remedy for the recovery of real estate by one claiming the legal title thereto against one in possession claiming an estate therein is an action of ejectment in which the facts may be submitted to a jury. See Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661.

The essential elements of the action of ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by the defendant. See Bridenbaugh v. Bryant, 79 Neb. 329, 112 N. W. 571.

The Robertsons' contention is that the plaintiff agreed to handle the case on a contingent fee basis of one-third of the money recovered, and if no judgment was obtained for money recovered the Robertsons were to pay the plaintiff $250 for clearing the title and recovering possession of the property.

The Robertsons gave the plaintiff a power of attorney, and the plaintiff attempted to perfect a settlement under such power of attorney, but the negotiations failed. Thereafter further negotiations were carried on in an attempt to settle the matter as between the Robertsons and Fergusons, and a settlement was consummated on

the 16th or 18th of March 1959. At the time the case was finally disposed of, the Robertsons obtained possession of the property, a quit claim deed for the same, and the keys to the property from the Fergusons. This deed was executed on November 4, 1958, and remained in the possession of the defendants' counsel until the settlement was made as heretofore mentioned.

On November 8, 1958, the plaintiff wrote a letter to the Robertsons, stating: "* * * while our original agreement for fees was on a contingent basis of one-third of the recovery, if you desire to close the matter at the time of settlement with Mr. Ferguson my fee will be $750.00."

On December 31, 1958, Robertson wrote the plaintiff, stating: "It is good news that the Fergusons have given possession, along with a quit claim deed. * * * If we are to settle on the terms of possession only, as you recommend we do; we need to know your fee for the case. Forget Mrs. Marr for the present. (Mrs. Marr was the mother-in-law of Dean C. Welch to whom the Welches gave a quit claim deed to the property here involved.) Please let us know what your fee will be if we accept their terms; we will then consider their offer."

On March 14, 1959, in a hearing held before Judge Polk in the Lancaster County district court, Robertson stated that he had not dismissed the plaintiff as counsel as of that time; that they could not agree on the plaintiff's fee; that the plaintiff wanted $1,500 and Robertson could not afford to pay that amount; that he had made arrangements for a loan and was able to obtain $500; and that he was going to talk to the plaintiff to ascertain whether they could arrive at an amicable settlement with relation to the plaintiff's attorney fees.

On March 14, 1959, the plaintiff agreed to accept $1,500 as his attorney's fee.

On March 19, 1959, Robertson wrote to the plaintiff stating: "When we came to you last summer, we were

in bad financial straits (in a sense we still are). You backed us in spite of this; for that we are grateful to you. * * * I am inclosing $50 as the first installment on the fees due you. Please let me know what you regard as a fair fee for your services. We can then make financial arrangements to pay you."

The plaintiff testified in detail with reference to the services rendered the defendants, the time required by him spent on the case, and other elements of work, and stated that in his opinion he belived a reasonable fee would be in the amount of $2,000. However, he had reduced his fee to $1,500. He further testified that Robertson had paid him $200; and that he considered the value of the property recovered to be $6,000.

It does appear from the record that the Fergusons claimed to have some rights and interests in the property here involved, and that it would be necessary either to arrive at a settlement with the Fergusons or, in the alternative, to file suit to obtain possession of the property and dispose of any interests the Fergusons might claim with reference thereto. The evidence in this respect has heretofore been covered.

We believe the evidence in this case is sufficient to warrant the jury in arriving at its verdict of $500.

It is not the function of this court to pass upon the evidence, but only to determine whether or not there was sufficient evidence to sustain the verdict. We find that the evidence was sufficient and that no error was committed. The verdict and judgment of the district court are affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOHN S. DAVIS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

106 N. W. 2d 490

Filed December 2, 1960. No. 34818.

1. **Criminal Law: Evidence.** When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial.
2. **Criminal Law: Witnesses.** In such a case, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown.
3. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
4. **Trial.** Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done.
5. ———. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.
6. **Larceny.** In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence.
7. **Criminal Law: Trial.** It is proper and not invasive of the province of the jury for the court, in charging on the flight of accused, to tell the jury that it is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances.
8. ———: ———. An instruction that accused's prior conviction may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility.
9. ———: ———. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged.

10. **Trial: Appeal and Error.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is a prosecution for grand larceny. Briefly the State's evidence is that the complaining witness parked a motor vehicle on a downtown street in Omaha near a hotel where he had rented a room and where the vehicle was, in part, visible from his room. There was a large amount of valuable electrical equipment in the vehicle.

About 1:30 a.m. the complaining witness from his room observed a car with distinct markings which parked behind his vehicle, and that a person got out and attempted to open the door of his vehicle. The complaining witness called the police. By the time they arrived, the car had left. It returned in about 20 minutes. The police were again called. Another witness observed a passenger from the car removing packages from the vehicle and placing them in the car. The police arrived. The car left. A chase followed. The car was wrecked. The defendant fled. He was captured. Parcels from the complaining witness' vehicle were found in the car in which defendant was riding. There followed a jury trial, a conviction, and an overruling of a motion for a new trial.

Defendant brings the matter here on petition in error. We affirm the judgment of the trial court.

Under the provisions of Revised Rules of the Supreme Court, rule 8a2(4), we consider errors assigned and discussed, and in the order presented by the defendant.

It appears that the trial above referred to was the second trial of the cause. The State produced a deputy sheriff who testified that in response to a subpoena he sought a witness for the State at her place of employment at the time of the first trial and was told that she no longer worked there. He next sought her at her residence address and was told she had married and left the city. He returned the subpoena reciting in the return that the witness was not found.

The defendant objected to the admission of the record of the former testimony of this witness, both direct and cross-examination. The court overruled the objection. The basis of the objection was that the State had not shown "a diligent search" for the witness.

The State says that the defendant waived the objection. We do not so read the record.

The trial court overruled the objection above recited. The State then asked the defendant to waive foundation for the reading of the record "from the transcript." The defendant waived the foundation so as to permit that to be done. The State reaches too far in this contention.

The right of the accused to "meet the witnesses against him face to face" (Art. I, § 11, Constitution) and the right of the State to prevent a miscarriage of justice because of the absence of a witness, have been presented and reconciled in this state.

In Koenigstein v. State, 103 Neb. 580, 173 N. W. 603, we held that: When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. In such a case, it must affirmatively appear that the per-

sonal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. In the body of the opinion we said: "* * * we ought not to reverse the action of the trial judge upon such questions as this, unless the facts proved make it clearly appear that he has abused his discretion."

This was followed in Meyers v. State, 112 Neb. 149, 198 N. W. 871, and subsequent cases.

In Trobough v. State, 122 Neb. 7, 238 N. W. 771, we held: "It is elementary that the evidence of a witness at a former trial may be read at a later trial, where such witness cannot be located to testify at a subsequent trial of the same case."

In Callies v. State, 157 Neb. 640, 61 N. W. 2d 370, we held: "There must be evidence of diligence on the part of the prosecution to locate the witness, and evidence of the unavailability of the witness to testify."

We do not find an abuse of discretion in this case. The claimed error is not sustained.

The next assignment relates to three pictures showing the property claimed to have been involved in this alleged offense which were offered and received in evidence. Defendant argues as error the admission of two of the pictures. He also argues as error the admission of a picture showing the parking place of the complaining witness' car taken from his hotel window, from which the complaining witness said he could see, in part, his motor vehicle. He also argues as error the admission of two pictures of the wrecked car which defendant was driving. The State produced evidence showing the presence of the material taken in the complaining witness' vehicle. It was then in boxes; a witness testified to seeing it taken from that vehicle and put in a car; other witnesses saw it in the car driven by the defendant; it was taken to the police station,

removed from that car and identified, and returned to the complaining witness; and it was later photographed. The chain of identity runs throughout the evidence. Although admitted early in the trial, the identification was reinforced as the trial progressed. Prejudice is not claimed by the admission after identification at the early stages of the trial.

The other pictures objected to are not claimed to be other than accurate representations of the things portrayed. While prejudice is claimed, it is not shown.

The rule repeatedly stated is: A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. Brockman v. State, 163 Neb. 171, 79 N. W. 2d 9.

The assignment is not sustained.

The next assignment of error arises from this situation: As previously suggested, the case had been tried before and a verdict of guilty set aside. This was the second trial. The State rested on January 27, 1960. The bill of exceptions does not show that the court had admonished the jury not to read newspaper articles.

On the morning of January 28, 1960, the defendant advised the court that an article appeared in an evening paper concerning the trial; that it referred to the former trial; and recited that the verdict in the former trial had been turned down for a technical error. The defendant claimed prejudice. He did not offer the alleged offending article for examination by the court. The trial court could hardly be expected to go buy the paper nor to advise the jury without seeing its contents. Defendant asked that the jury be polled to determine if any of the jurors had read the article and that, in the event they had, he would make a motion for a mistrial. The motion to poll the jury was overruled. Thereafter the newspaper article and affidavits of jurors were offered in evidence on the motion for a new trial.

Obviously instead of offering the claimed offending article in evidence when it was published, defendant elected to take his chances on a favorable verdict. He thereafter proceeded to offer his evidence-in-chief. A favorable verdict not having been had, he now seeks to take advantage of the claimed error.

We have repeatedly held: Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

We have also held: A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

Our concluding paragraph in Millslagle v. State, 138 Neb. 778, 295 N. W. 394, seems applicable here: "We conclude the defendant consented to and acquiesced in the rulings of the trial court as heretofore designated, desiring to take his chances of a favorable verdict, with the power and intent to annul it as erroneous and void if the verdict should be against him. He cannot remain idly by and then profit by such conduct. To hold otherwise would be to definitely violate the right of the trial court to exercise its sound discretion in correcting errors * * *."

The jury found the value of the property taken to be $505. The complaining witness was a salesman in charge of the property. He sold on a commission basis. He testified that the retail price was a little over $500 and that the cost was $400. The complaining witness made out a report to the police department showing the approximate value of the property to be $505 as based on the five different articles, although there was an error in the totaling of the amounts. This witness

testified without objection that the values shown as to each item were the "reasonable fair value." The testimony as to value was not challenged by defendant's evidence.

We have held: In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. Spreitzer v. State, *supra.*

The assignment does not merit further discussion. It is not sustained.

Defendant next complains of certain instructions. Instruction No. 14 was: "Evidence has been offered and admitted, tending to show flight by the defendant soon after commission of the offense charged in the Information, and before he had been apprehended or taken into custody.

"You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with which the person so fleeing has been charged, is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the Jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person."

The undisputed evidence was that defendant and his companion left the scene of the crime when a police car appeared; that they were chased several blocks; that shots were fired; that the pursuing and pursued cars collided and were damaged; and that defendant fled on foot and was finally taken after a struggle.

The defendant testified that he fled because he was driving the car without having a driver's license. The rule stated in 23 C. J. S., Criminal Law, § 1185, p. 725, is: "It is proper and not invasive of the province of the jury for the court, in charging on the flight of accused, to tell the jury that it is a circumstance which may be considered by them, and from which

they may draw an inference of guilt in connection with other circumstances."

Also in 23 C. J. S., Criminal Law, § 907, p. 147, it is stated: "The flight of accused is a circumstance to be considered against him in connection with the other evidence, its probative effect, as evidence of guilt, depending on the conditions and the motive which prompted it."

Further, in 53 Am. Jur., Trial, § 710, p. 537, it is stated: "Where, in a criminal case, there is evidence of the defendant's flight, the jury should be properly instructed as to the manner in which they should consider and weigh such evidence, * * *."

Under the circumstances here, the instruction given was favorable to the defendant. The instruction given was a proper one under the circumstances.

The court instructed the jury in instruction No. 12 that: "The defendant has testified in his own behalf as he had a right to do. You have no right to disregard the testimony of the defendant on the grounds alone that he is the defendant and stands charged with the commission of a crime; nor are you required to receive the testimony of the defendant as true, but you are fairly and fully to consider whether it is true, and for this purpose you have the right to consider the interest of this defendant in this prosecution. This last sentence is not intended to impeach or discredit the testimony of the defendant, but only as a reasonable precaution for you to observe.

"The law presumes this defendant to be innocent until he is proved guilty by the evidence beyond a reasonable doubt. The law allows him to testify in his own behalf and you should fairly and impartially consider his testimony, together with all of the other evidence in this case."

The court also instructed the jury in instruction No. 13 that: "You are instructed that there has been testimony to the effect that the defendant has been pre-

viously convicted of felonies. This testimony is admissible and received only for the purpose of affecting the credibility of the defendant as a witness and is not to be considered by you except for that purpose, in determining his guilt or innocence of the offense charged."

Defendant complains about these instructions separately and together as giving undue prominence to the personal interest of the defendant in the outcome of the prosecution.

Instruction No. 12, with a cautionary instruction for the benefit of the defendant added, was substantially approved in Johnson v. State, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B 965, and again approved in Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672. It is again approved.

As to instruction No. 13, the rule is stated: "An instruction that accused's prior conviction may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility." 23 C. J. S., Criminal Law, § 1181, p. 721.

The jury may be told that in deciding on the weight to be given the testimony of the accused it may consider the former conviction of the accused. 53 Am. Jur., Trial, § 789, p. 586.

We held in Vanderpool v. State, 115 Neb. 94, 211 N. W. 605, that it is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. As stated therein: "Without such an instruction the jury are apt to regard the previous conviction as a circumstance tending to prove guilt of the offense for which accused is being tried."

The instruction was obviously for the benefit of the defendant. We find no merit in the assignments involving this instruction.

Finally, defendant asserts there was misconduct of

counsel for the State in making inflammatory references during argument to the jury to another police chase in the city of Omaha. The only references to it which we find or which have been pointed out are statements appearing in affidavits of jurors offered in support of a motion for a new trial. The rule is: A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398.

The judgment of the trial court is affirmed.

AFFIRMED.

MARVIN HARGER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
106 N. W. 2d 176

Filed December 2, 1960. No. 34876.

1. **False Pretenses.** The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud.
2. ———. A conviction for obtaining money by false pretenses may not be sustained in the absence of proof of false pretense and of intent to cheat and defraud.

ERROR to the district court for Jefferson County: ERNEST A. HUBKA, JUDGE. *Reversed and remanded with directions.*

George A. Skultety, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is a criminal action wherein, in the district court for Jefferson County, Nebraska, Marvin Harger was

charged by information in the name of the State of Nebraska with the offense of obtaining money by false pretenses. The case was tried to a jury and a verdict of guilty was returned, after which the defendant was sentenced to serve a term of 1 year in the State Reformatory for Men. The defendant in the district court, as plaintiff in error here, has brought the record to this court by petition in error for review. He will for convenience be referred to as defendant. By his petition he asserts that his conviction and sentence were erroneous and should be reversed. The State of Nebraska is defendant in error but it will be referred to as the State.

The information on which the defendant was tried and convicted charges in substance that on October 10, 1959, the defendant with intent to cheat and defraud did falsely, knowingly, designedly, and unlawfully promise to marry Janice Kasparek; that he pretended and represented that he was placing himself in a position to marry the said Janice Kasparek, and that if Janice Kasparek would furnish money to make payments on an automobile owned by the defendant she would have an interest in the automobile and be secured in her advancements; that relying thereon Janice Kasparek gave to the defendant on or about October 10, 1959, $50; and that thereafter during October and November 1959, she gave him other money which with the first $50 amounted to a total of $400. Janice Kasparek will be hereinafter referred to as the prosecutrix.

The brief of the defendant contains six assignments of error as grounds for reversal. From an examination of the record it appears that only one requires specific consideration herein. By this one it is asserted that the court erred in failing to sustain the motion for directed verdict. This motion was made at the close of the State's evidence in chief.

Assuming, but not deciding, that the information is sufficient as a charge of crime, the determination upon

the assignment of error that the court erred in its refusal to direct a verdict in favor of the defendant at the close of the State's evidence depends upon the question of whether or not there was evidence to support the essential elements of the charge contained in the information.

The promise of marriage was proved. This is not disputed. It was also proved without contradiction that the alleged declaration of the defendant that he would attempt to put himself in a position which would permit him to perform his agreement of marriage was true. He did not however put himself in a position to contract a marriage.

He was already a married man. As to this the prosecutrix was informed. She testified that she met the defendant first in the last part of August 1959 in the daytime and that evening she had a date with him on which occasion he told her that he was married, had two children, and that he wanted to get a divorce. She testified that it was about 2 weeks later in Fairbury, Nebraska, that the subject of marriage came up. It was then that she agreed to marry him. She said she agreed to marry him but not until he got a divorce. She testified that no date for the marriage to take place was discussed but they thought they could be married by the first of the year.

She testified that some of the money given to the defendant was for payments on an automobile. She referred to all advances made as money loaned. She said as to the advances that the defendant told her that if she let him have the money "it would be just as much interest as it was mine if I let him have the money, and that I could use it whenever I wanted to." Nothing was ever said about the title to the car. She was allowed to use the car freely at all times until the defendant left Fairbury, Nebraska, and went to Wichita, Kansas, to seek new employment.

It has been pointed out that the promise of marriage

has been proved. Is there evidence on behalf of the State that this promise was false and fraudulent and if so was it breached? These are of course elements which require proof.

There is a total absence of proof on the part of the State that the promise of marriage in the light of the existing conditions, which had been disclosed and were well known to the prosecutrix, was in anywise false and fraudulent. Insofar as this record is concerned there is nothing to indicate that the promise was not made in good faith and there is nothing to indicate that it was not the intention of the defendant at all times to keep and perform the promise. It was not the defendant who breached the agreement. It was the prosecutrix who breached the agreement. The prosecutrix was asked questions and gave answers as follows: "Q Has Marvin ever refused to marry you? A No, he never did refuse to marry me. Q And so your romance was broken off when you told him on the phone that you didn't love him any more; that's when it was broken off? A Yes." With regard to the conversation to which these questions pertain she also testified: "And, so, I just told him, no, that I didn't want to have anything more to do with him." This conversation took place in December 1959. There is other testimony of the prosecutrix of like effect in the record, which will not be repeated herein, but none to the contrary. The original complaint charging the defendant with the offense for which he was prosecuted was filed on January 8, 1960.

As an observation, the defendant could not put himself in a position to marry the prosecutrix while residing in this state for a long period of time after the promise was made. The defendant came to Nebraska in August 1959. His previous marriage was contracted in the State of Nevada. His wife lived in California. Obviously no ground for divorce arose in this state. Under these conditions, even if the defendant had grounds for divorce,

no divorce could have been obtained under the laws of the state earlier than August 1961, or 2 years after he became a resident. See § 42-303, R. R. S. 1943.

The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud. See, Ketchell v. State, 36 Neb. 324, 54 N. W. 564; Thompson v. State, 112 Neb. 389, 199 N. W. 806; Brennan v. State, 141 Neb. 205, 3 N. W. 2d 217; Dwoskin v. State, 161 Neb. 793, 74 N. W. 2d 847; Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653.

In the light of what has been pointed out it becomes clear that the evidence of the State does not amount to proof of the charge against the defendant. The motion of the defendant for a directed verdict should have been sustained at the time it was made.

The evidence of the defendant in no particular amounts to proof of the charge against the defendant. On the entire record, therefore, the essential elements of the crime charged against the defendant stand without any evidentiary support. The result of this was that at the conclusion of the evidence there was no issue properly submissible to a jury.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the charge against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

WILLIS BAER, APPELLEE, V. OTTO SCHAAP, DOING BUSINESS AS SPEEDWAY SCAFFOLD COMPANY, APPELLANT, IMPLEADED WITH PARSONS CONSTRUCTION CO., A CORPORATION, APPELLEE.

106 N. W. 2d 468

Filed December 9, 1960. No. 34497.

1. **Evidence.** While evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose.
2. ———. When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion.
3. **Torts.** Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover.
4. **Negligence.** The causal connection between defendant's act or omission and the injury must not be left a matter of surmise or conjecture, and cannot be established by evidence which is merely consistent with or indicates a mere possibility or probability thereof, as by evidence which merely shows two or more possible causes of the injury, for not all of which defendant is responsible; or which leaves it a matter of speculation or conjecture as between such causes; or which is equally consistent with the theory that the injury resulted from a cause for which defendant is not responsible.
5. ———. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
6. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
7. **Evidence: Trial.** Where several inferences are deducible from facts presented, which inferences are opposed to each other but

equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover.

8. Trial. Where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. On motion for rehearing. See 168 Neb. 578, 97 N. W. 2d 207, for original opinion. Original opinion withdrawn. *Reversed and remanded with directions.*

Webb, Kelley, Green & Byam, for appellant.

Rice & Adams and *Schrempp & Lathrop,* for appellee Baer.

O'Dowd & Swift and *Crossman, Barton & Quinlan,* for appellee Parsons Constr. Co.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action for damages for personal injuries. Our first decision in this case is found in Baer v. Schaap, 168 Neb. 578, 97 N. W. 2d 207. A rehearing was granted. The motion for rehearing presents only two questions. The first is the sufficiency of the evidence to justify submitting the cause to the jury. We now find it necessary to decide only that question. We conclude that our former decision was in error in holding the evidence sufficient. That decision is set aside.

We reverse the judgment and remand the cause with directions to sustain the motion for a directed verdict.

We refer to our former opinion and the dissent for a more detailed general statement of the issues and facts.

We refer herein to plaintiff as Baer, who was the

injured employee of defendant Parsons Construction Company. We refer to defendant Schaap as Speedway, as he operated under the name of Speedway Scaffold Company. Appellee Parsons Construction Company is referred to as Parsons. It is in the case seeking subrogation for compensation payments to Baer. To that extent Parsons' interests and Baer's interests are identical.

Baer alleged that Speedway "erected, set in place, and rented to" Parsons certain scaffolding around a building being remodeled and that the scaffolding "thus erected" was "not erected in a safe, suitable and proper manner," so that a plank thereon gave way and dropped plaintiff to the sidewalk below to his great injury. That allegation presented the essential issue and limits the scope of the inquiry.

We are presented with two difficulties appearing in the record. The accident involved herein occurred in September 1954. The petition was filed in June 1955. The cause was at issue in February 1956. It was tried in January 1958 on amended pleadings. The delay in bringing this matter to trial obviously accounts for some if not all of the confusion, lack of memory, and contradictory statements of witnesses. Trial courts could avoid this sort of a situation by insisting on a reasonably prompt trial in these cases.

Repeatedly in this record witnesses refer to exhibits, pointing out that about which they are testifying, and "indicating" it. We have repeatedly criticized trial courts for permitting such a record to be made. It is difficult, and at times impossible, for a reviewing court to read such a record and do more than speculate as to what lawyers, court, and jury had indicated to them. We again criticize the procedure here in that regard.

The first question here is: Did Speedway place the plank in the scaffold that upended and caused Baer to fall?

The parties are in general agreement that Speedway

built a scaffold for Parsons; that Parsons accepted and used it; that Baer was an employee of Parsons; and that a plank on which he was standing gave way, causing him to fall to his injury.

There is further general agreement that the scaffolding was built of steel uprights, 7 feet apart lengthwise, and 5 feet apart from side to side. The uprights were connected by horizontal steel bars upon which the scaffold floor boards were placed.

It was agreed at the bar here and in the briefs that the scaffold was erected about 2 feet from the building and that steel brackets were placed on the scaffold to reach from the inside upright to the building. These were in the shape of a right-angled triangle with the top arm at right angles to the building and about 22 inches in length. Speedway floored the scaffold proper with planks 2 inches thick and either 10 or 12 inches in width, and 14 and 16 feet long. This becomes important in the light of evidence to be cited later.

It is undisputed that Speedway put 16-foot-long planks side by side across two of the 7-foot spaces between the supporting uprights so that they extended 1 foot at each end beyond the crossbars on which they rested. Then two spaces were skipped and another side-by-side row of 16-foot-long planks were placed as before. Then 14-foot-long planks were placed bridging that opening. These lapped over the 16-foot planks 1 foot at each end.

Speedway's construction man testified that every one of the 14-foot-long planks was nailed to the 16-foot plank beneath it. Parsons' superintendent inspected the scaffold and testified that he found from 5 to 10 percent of the planks not nailed, and nailed them. It is, then, undisputed except by argument, that before Parsons began the use of this platform every 14-foot plank which Speedway put in the scaffold was nailed to the 16-foot plank beneath it and that the overlap was 1 foot.

We must accept as a fact from the jury's verdict that Speedway did not nail all of the planks and that Parsons

undertook to do so before it permitted its use by workmen. Parsons accepted the scaffold as satisfactorily constructed.

At this point the purpose of the nailing can be recited. It is likewise undisputed and testified to by a witness for Baer that the planks were nailed if employees were going to work on them for a long time and should be nailed if it was a matter of weeks and days "because they will work" or slide back and forth so that "one end may drop." It was in the interest of good safety to nail them down.

We are, then, confronted with a record that establishes without dispute that every 14-foot plank was above the end of a 16-foot plank and any "working" of it would be against the force of gravity and that the 14-foot plank would have to "work" at least 1 foot before it could upend and fall.

We are mindful of the testimony of Baer's witness that he measured the plank that flipped up as 14 feet in length so that if it slipped "an inch or so either way" it would upend and fall.

From this evidence it is argued here that the plank which upended had only a 1-inch overlap and had to slip only that distance before it would give away on its loose end.

The fallacy of this argument is that under the undisputed evidence the plank, if put there by Speedway, would have had to slip at least 1 foot before it would upend and fall when someone got on its short end, there being no evidence that any other plank on the platform was disturbed when the one plank gave way. There is no evidence that Speedway put 14-foot planks at this point in any other position than overlapping 16-foot planks. No witness testified that the plank that upended had been resting on a 16-foot plank.

Baer's witness and Parsons' superintendent testified to the fact that the planks were nailed together; and no one testified that a nailed plank will "work." We are

not unmindful of the fact that Baer's witness testified that there were neither nails nor nail holes in the plank that upended. From that evidence, however, no inference can arise that Speedway placed this plank in the scaffold.

Were there side brackets put on the scaffold by Speedway? It is conceded here that the answer is "Yes." Baer testified that he was an experienced construction man, had erected and used scaffolds for years, and was an experienced bricklayer and foreman at the time of the accident.

The conceded physical facts are that the scaffold was to be used in removing and repairing the wall of the building and that in part an overhanging cornice was to be removed. Yet Baer testified, in effect, that there were no brackets on the scaffold, as did one other of his witnesses, as both testify that it was the inside plank on the main platform that gave way. Other witnesses testify as to the existence of the brackets.

Were planks placed upon the brackets? Speedway's construction man testified as a witness for both Baer and Speedway. He testified that he placed one row of planks on the brackets, and *"about centered"* on the brackets. The plank so centered was either 10 or 12 inches wide. So that if only 10 inches wide the planks so placed by Speedway left an opening on either side of not to exceed 7 inches, or as stated by the witness, "a small opening." Baer's witness testified that the plank which upended was 2 inches by 10 inches.

Were there other planks placed on the brackets? Parsons' construction superintendent testified that he placed a string of planks on the brackets "to hold the plywood." At one point he described them as 2 inches by 10 inches. At another point he says 2 inches by 8 inches. That evidence is undisputed. Parsons' man says it did not "change the structure" of the scaffold. But if Parsons put this row of planks there then it has to follow that the Speedway row of planks was moved over and

to the inner or outer side of the brackets to make room for it. The construction of the scaffold had to be changed by Parsons after Speedway had delivered it to them.

This conclusion is arrived at also by another bit of undisputed evidence.

A plywood apron 2 feet wide was placed on the brackets and against the building. The entire platform and plywood apron was then covered by canvas. Baer testified that the plywood was notched so as to fit over the posts of the scaffold. Otherwise brackets being absent, according to his testimony, the plywood would have no support. Parsons' man testified that he rested the plywood on the row of planks and that it then came to 1½ or 2 inches from the planks on the inside of the uprights. It follows that if he nailed the plywood to planks it was not those placed there by Speedway unless the Speedway planks had been moved after Parsons accepted complete control of the scaffold.

The canvas and plywood were removed by Parsons either the day of or the day before the accident. Baer assisted in the removal. The evidence is important here because it shows that there were neither "days" nor "weeks" that employees were using the exposed planks so as to cause them to "work." The evidence is that the plywood was nailed to the planks. There is no evidence nor contention that the plywood "worked" either way, hence it would necessarily follow that any "working" of the plank had to occur after the plywood was removed.

Which plank fell? All witnesses agree that it was the one nearest the building. It struck the building, lodged in one of the brackets, and nearly struck a fellow workman looking over the edge of the roof.

Baer and one of his witnesses testified it was the inside plank of the scaffold proper. He now recedes from that evidence. If it was the plank nearest the

building and on the brackets it could be or could not be a plank put there by Speedway.

There is no identification of it as such as a plank put there by Speedway. We are not unmindful of one bit of evidence in this regard. Parsons' man testified that the plank was a Parsons' plank. On rebuttal a claim adjuster for Parsons' insurance carrier was called as a witness. He testified that he and Parsons' superintendent had talked about who had erected or constructed the scaffolding and that Parsons' man said Speedway had installed the plank that fell. This was admitted over objection for purposes of impeachment. The court so stated and counsel for Baer replied that that was correct.

The rule is that while evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

It is said here that the jury was justified in disregarding the testimony of Parsons' superintendent because he testified that it was a Parsons' plank that upended and a witness testified that the superintendent had earlier said it was a Speedway plank.

If we are to put aside all of the testimony of this witness as to that subject matter as untrue, it leaves testimony of witnesses for Baer, including himself, in hopeless confusion.

Baer and one of his witnesses testified that there were no brackets on this scaffold. The undisputed testimony otherwise is that there were brackets. It was conceded at the bar here that there were brackets. The falling plank lodged in the brackets and did not reach the ground. Baer testified that there were planks put on the principal scaffold only. The evidence shows and it is admitted at the bar here that there were six rows of

planks (one on the brackets), as testified to by Speedway's construction man, a witness for Baer. Baer testified that the plank that upended was the one nearest the building. If his testimony is accepted, Baer was working that afternoon when the accident occurred at a height of 40 feet, washing down the wall with an open space of approximately 2 feet between him and the building. This presents a rather improbable situation.

However, it is undisputed also that the plank that fell struck a slight projection on the building and that in its partial revolution, with the crossarm or bracket as a pivot, it nearly hit a witness for Baer looking over the roof. There would have been no lodging in the nonexistent bracket under those circumstances.

No matter whether this record is read from the viewpoint of the evidence that went to the jury, or from the viewpoint of Baer's evidence, excluding Speedway's witness (Parsons' superintendent), the result is one of hopeless confusion out of which an answer can be drawn only by confused speculation.

These rules, then, become applicable: " 'When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that, if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion.' " Butler v. Reed-Avery Co., 186 Md. 686, 48 A. 2d 436. See, also, Kaufman v. Baltimore Transit Co., 197 Md. 141, 78 A. 2d 464; Hegarty v. Berger, 304 Pa. 221, 155 A. 484; Campbell v. State, 203 Md. 338, 100 A. 2d 798.

"Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover." 86 C. J. S., Torts, § 59, p. 984.

"* * * the causal connection between defendant's act or

omission and the injury must not be left a matter of surmise or conjecture, and cannot be established by evidence which is merely consistent with or indicates a mere possibility or probability thereof, as by evidence which merely shows two or more possible causes of the injury, for not all of which defendant is responsible; or which leaves it a matter of speculation or conjecture as between such causes; or which is equally consistent with the theory that the injury resulted from a cause for which defendant is not responsible; * * *." 65 C. J. S., Negligence, § 244, p. 1092.

Here, as we read this evidence, the answer to the question of "was it a Speedway plank that upended" is a matter of speculation and conjecture. Baer's evidence shows that it could have been and could not have been. That is not enough.

A restudy of this evidence causes us to apply the rule that the burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Mimick v. Beatrice Foods Co., 167 Neb. 470, 93 N. W. 2d 627.

We also apply the rule that in every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

Here the evidence as to who placed the upending plank in the platform is purely circumstantial. We apply the rule that where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

At the conclusion of Baer's evidence and again at the conclusion of all of the evidence, Speedway moved for a directed verdict. Speedway later moved for judgment notwithstanding the verdict. These motions were overruled.

The situation calls for the application of the rule that in a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

The judgment of the trial court is reversed and the cause remanded with directions to sustain the motion for a directed verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., dissenting.

I disagree with the present opinion of this court, which sets aside our former opinion herein upon the ground that the evidence is not sufficient to justify submitting the cause to a jury. In my opinion the evidence adduced at the trial was sufficient to justify the trial court's submitting the issue of appellant's liability to the jury.

In view of the fact that the author of the court's present opinion, when referring to the evidence, uses such expressions as "undisputed," "undisputed except by argument," "without dispute," "no inference can arise," "conceded," "witnesses agree," "hopeless confusion," and "a rather improbable situation," I call attention to the fact that this is a law action in which a verdict has been rendered and that the record on appeal is not before us for review de novo.

We have frequently held, in such cases, that it is not

the province of this court, in reviewing the record in an action at law when a verdict has been rendered, to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain such verdict admissible testimony tending to support the case of the successful party should be accepted as the truth. See, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315; Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557; Harris v. Pullen, 169 Neb. 298, 99 N. W. 2d 238. It is the same rule, in principle, as applies to a ruling on a motion for a directed verdict or for a judgment notwithstanding the verdict. See, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238. As stated in Anderson v. Evans, *supra:* "In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom."

In view of certain principles stated in this court's present opinion, I call attention to the following holdings of this court:

"In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

"Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the neg-

ligent act complained of." Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

I shall review the record for the purpose of disclosing why I think the evidence adduced justified the trial court submitting this cause to the jury.

Parsons Construction Company, to which I shall hereinafter refer as Parsons, had a contract to tear down the cornicing along the top of the north and west walls of the three-story Patterson Building located at the southeast corner of Seventeenth and Farnam Streets in Omaha, Nebraska, and to replace it with a brick firewall to be capped with stone. To carry out this contract Parsons entered into an oral lease agreement with Otto Schaap, doing business as Speedway Scaffold Company and hereinafter referred to as Speedway, to build a suitable scaffold on the north and west sides of this building for the use of Parsons' employees in performing this contract. Speedway constructed a metal frame scaffold with a wooden platform for this purpose and on August 23, 1954, turned it over to Parsons. This wooden platform consisted of two parts, that inside the frame structure of the scaffold itself and that on brackets, whenever used. Parsons' employees thereafter used this scaffold in performing the contract. On September 14, 1954, about 2 p.m., appellee Willis Baer, an employee of Parsons, fell from the platform of the scaffold to the concrete sidewalk below, a distance of some 35 to 40 feet, seriously injuring himself.

Before discussing the details of the situation I think it would be best to introduce the witnesses and how they fit into the picture. Edward Connolly, to whom I shall refer as Connolly, was and is a salesman for Speedway. However, he supervised and actually performed the major part of the work of installing the scaffold. Henry Chris Sorenson, to whom I shall refer as Sorenson, was employed by Parsons as its general construction superintendent to oversee the work of all its smaller jobs, then six in number, which, on September 14, 1954,

included the Patterson Building job. Appellee Willis Baer, to whom I shall refer as Baer, was an employee of Parsons and, on the Patterson Building job, foreman of the brick work, being a bricklayer by trade. Dale Gosch, to whom I shall refer as Gosch, worked as a laborer for Parsons on the Patterson Building job and actually saw Baer fall, being on the roof of the Patterson Building at the time of the accident and only about 3 feet from Baer when he fell. Charles LeRoy Cato, to whom I shall refer as Cato, also worked as a laborer for Parsons on this job and was on the roof of the Patterson Building when the accident occurred. He did not see the accident. However, he did see Baer on the sidewalk immediately after it happened and removed the plank that upended from where it had lodged in the scaffold. E. F. Morgan, to whom I shall refer as Morgan, was employed by the Fidelity Casualty Company of New York as a claim adjuster and, in behalf of Parsons, interviewed Sorenson about the accident on both October 12 and November 25 or 26, 1954, in connection with workmen's compensation liability.

Connolly testified that in building the platform for the scaffold they used both 2 x 10- and 2 x 12-inch planks of which some 35 were 14 feet long and 40 were 16 feet long. He further testified that on the main deck of the scaffold, between the upright posts, he installed a platform five planks in width and that on the brackets he installed a platform one plank in width, using either 2 x 10- or 2 x 12-inch planks on the brackets, and that he centered the planks installed on the brackets. Brackets were used on the north side where Baer fell.

That a jury could find there was negligence in the construction of the scaffold used by Parsons is evidenced by the following: Connolly testified whenever a scaffold was to be heavily used over a period of time, such as was here contemplated and done, the planks used in building any platform thereon should be nailed to prevent the planks from sliding or working; that he

did the nailing; that he checked to be sure that all planks used in the platform floor were securely nailed; and that he knew of no plank included in the flooring of the scaffold which hadn't been so nailed. However, Sorenson testified that before he let employees of Parsons use the scaffold, after it was turned over to him by Speedway on August 23, 1954, he inspected the scaffold in detail; that he found Speedway had nailed only about 90 to 95 percent of the planks used in the floor of the scaffold; that from 5 to 10 percent had not been nailed; and that he nailed or put cleats on the 5 to 10 percent that had not been nailed to keep them from sliding or working. When I refer to planks used by Speedway in constructing the platform of the scaffold I include those placed on the brackets. When we bear in mind, as will hereinafter be brought out, that the plank that upended and let Baer fall had neither been nailed nor cleated, then it can be understood how a jury could find that whoever installed that plank in the platform of the scaffold did so negligently, and that such negligence caused the accident.

But, was there evidence from which a jury could find that the plank that upended was placed in the platform by Speedway?

Baer fell at a point on the north side of the building about midway thereof. At the time he was cleaning mortar stains from the face of the brick of the new firewall with a sponge. At that point the main scaffold had been placed some distance (probably about 22 inches) from the wall because the cornice on the building, which was later torn down, stuck out that far and prevented the upright posts of the scaffold from being placed any closer to the wall itself. To bridge this gap, so the workers using it could get closer to the building, brackets were attached to the upright posts of the scaffold, which brackets extended over to the wall and were some 22 inches in length and had a surface on which to place planks for a platform of some 21½ inches.

Connolly testified he placed only a one-plank width platform on these brackets, which he centered, before turning the scaffold over to Parsons because Sorenson advised him that a one-plank width on those brackets would be enough.

When the scaffold was turned over to Parsons, Sorenson said there was a gap of some 14 or more inches between the planks on the platform and the wall of the building so he took strips of ¾-inch plywood, 2 feet wide, laid them up against the wall, about a foot above the platform, and toe-nailed them to the platform planks; and that he then placed a canvas tarpaulin over the top edge of this plywood board and spread it clear across the platform of the scaffold in order to prevent the debris from the cornice, as it was being torn down, from falling down onto the sidewalk.

The canvas and plywood on the scaffold north of the building remained in place until the morning of September 14, 1954, when Baer caused it to be removed. The platform of the scaffold, after the canvas and plywood had been removed, was then back in the form in which it was when it was covered by the canvas, as Baer testified that nothing was taken from or added to the platform of the scaffold at the time this canvas and plywood were removed.

It is true that Sorenson testified that he had placed additional (2 x 8- or 2 x 10-inch) boards or planks in the platform on the brackets north of the building before putting up the plywood and placing the canvas thereon. However, the jury was not bound to believe this statement because Sorenson was thoroughly discredited and impeached on this and many other facts about which he testified in connection with the scaffold and the accident. Morgan testified that Sorenson told him, during the interviews he had with him shortly after the accident, that Parsons had never added any boards or planks to the platform of the scaffold constructed by Speedway. Connolly also testified that

Sorenson advised him that one plank was all that need be placed on the brackets. Sorenson testified he put up the plywood to cover a 14- to 18-inch gap between the plank on the bracket and the north wall, which would not be the situation if there had been two planks on these brackets. Baer also testified there was a 6- to 8-inch gap between the platform he was standing on at the time he fell and the wall, which would only be true if there had been but one plank on the bracket but not if there had been two. I think a jury could properly find that there was only a one-plank width on the bracket at the time that Baer fell; that it had been placed there by Speedway; and that the plank used, being only 14-feet long and neither nailed nor cleated, was negligently installed by Speedway for, by so installing it, the plank could work or slide when used and then upend whenever it had slid an inch or more and the overlap ceased to exist.

It is true that some of Baer's witnesses were mistaken in where the plank that upended was in the platform itself, but all of them correctly placed it as the one nearest the building. Cato testified he knew there were brackets there on which planks had been placed, however, he testified the plank that upended and fell constituted part of the main floor of the scaffold, being a plank inside the posts thereof. However, he also testified it was the inside plank, the one next to the building, that fell as that is where Baer was working. Gosch, who was on the roof of the Patterson Building and an eyewitness to the accident from only a few feet away, testified the plank that upended and let Baer fall to the sidewalk below was part of the main floor of the scaffold and inside the uprights. However, Cato was not certain whether there were brackets on the scaffold extending over toward the building, as he didn't pay any particular attention to that, but doesn't think there were although he wouldn't definitely say there weren't any. He does testify that Baer fell next to the building and

that the plank next to the building is the one that upended. Baer testified he fell straight down next to the building and that the plank next to the building, some 6 or 8 inches from it, was the one that gave way.

It would only seem logical for the jury to find that the plank that upended and let Baer fall was the one next to the building. Thus, it seems to me from the evidence I have discussed, a jury could properly find that Speedway placed the plank that fell on the brackets without nails or cleats and so short that it would only have about a 1-inch overlap, since the upright posts on which these brackets were placed are 7 feet apart.

That the jury could properly disbelieve anything Sorenson testified to is further evidenced by the following: Sorenson tried to identify the plank that fell as one he had selected from lumber in the Parsons' yard and used in connection with a derrick that Parsons had installed on top of the roof of the Patterson Building. This derrick was used to lift materials they needed in connection with the job up onto the roof, particularly the capping stones for the firewall which weighed some twelve hundred pounds each. Sorenson testified these stones had been lifted onto the roof some 10 days to 2 weeks before September 14, 1954, and immediately placed on the firewall as capping because, due to their weight, they couldn't be left on the roof. Just how or when any of these planks could have gotten into the platform on the brackets Sorenson did not try to explain.

The facts are, as testified to by other witnesses and clearly shown by one picture offered in evidence, that the capping had not been placed on the firewall on September 14, 1954, and that it was not lifted to the roof until shortly before November 1, 1954, when it was placed as capping on the firewall.

Sorenson identified the planks he selected from the yard of Parsons as 4 planks, some 12 or 13 feet in length and 2 x 12 inches in dimension. The plank that fell was 14 feet long and 2 x 10 inches in dimension.

Finally Sorenson admitted that he told Morgan in the interviews had with him shortly after the accident that Speedway had installed the plank that fell from the platform and Morgan corroborated the fact that Sorenson had so advised him.

I bring out the foregoing for the reason that Sorenson is the only witness that I can find who testified to the fact that Parsons had added any plank to the platform of the scaffold after the scaffold had been turned over to it by Speedway. The jury, in my opinion, was completely justified in not believing Sorenson in this respect for the reason that I have already stated. If it did not believe him in this respect then all the planks that were on the platform at the time Baer fell had been placed there by Speedway and if it so found, as I think it had a perfect right to do, based on the record before us, then the jury also had a right to find from the evidence adduced that the manner in which it was placed there by Speedway was negligent and that such negligence was the proximate cause of its upending and letting Baer fall to the sidewalk below, some 35 to 40 feet, and causing the injuries for which the jury had given him financial relief.

In my opinion the record presents a jury question.

CHAPPELL, J., joins in this dissent.

MESSMORE, J., concurs in this dissent for reasons set forth in the court's original opinion.

THELMA HERMILLA, APPELLEE, V. EVERETT E. PETERSON, APPELLANT.

106 N. W. 2d 507

Filed December 9, 1960. No. 34793.

1. **Damages. The future pain and suffering which a jury may consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person.**

2. ———. Damages for permanent injury cannot be based upon speculation, probability, or uncertainty but must have as a basis therefor evidence that permanent damages clearly shown are reasonably certain as a proximate result of the injury.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded.*

Healey, Wilson & Barlow, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

There was a collision at about 3 o'clock on the afternoon of March 2, 1958, at the intersection of South and Twenty-fourth Streets in Lincoln, of two automobiles, one driven by Noble Leroy Hohl, hereafter called Hohl, and the other by appellant. The former was traveling west on South Street and was making a left turn to go south on Twenty-fourth Street. Appellant was at the same time operating his automobile towards the west on South Street and in attempting to pass the automobile of Hohl, collided with the left side of it because it was turned left into the path of the automobile of appellant. Appellee, an employee of Hohl and his wife in their nursing home operations, occupied the right side of the front seat of the Hohl automobile at the time of the collision. In this action for the recovery of damages she claims to have sustained because of the collision of the automobiles, she alleged she suffered a sprained back which caused her constant pain in her neck and lower back region; that thereby she became emotionally disturbed and suffered from headaches, nervousness, loss of sleep, weakness, and pain; that her condition would continue for an indefinite time in the future; that appellee sustained permanent impairments to the physical structure of her body in that the nerves and soft tissue

of the neck and back were damaged and irritated and thereby she had permanent impairment and loss of her bodily strength and functions; and that the injury and damage suffered by appellee were the direct result of the negligence of appellant.

The substance of the defense of appellant was a denial of the claims of appellee, an assertion of ordinance provisions of the city of Lincoln, and a plea of contributory negligence more than slight of appellee. A trial of the issues resulted in a verdict in favor of appellee and the rendition of a judgment in accordance with the verdict. The motion of appellant for a new trial was denied and this appeal is from that action of the trial court.

The substance of the assignments of appellant in this court is that the trial court committed error in submitting to the jury the issues of damages for permanent injury and future pain and suffering because there was no evidence that permanent injury or future pain and suffering were reasonably certain as a proximate result of the accident, and that the verdict of the jury was excessive.

Appellant at the close of all the evidence by motions asked the trial court to withdraw from the consideration of the jury the issue of permanent injury because of the absence of proof that a permanent injury to appellee was caused by the collision and to withdraw from the consideration of the jury the issue of future pain and suffering because it was not sustained by proof. The motions were denied and these issues were submitted by the trial court to the jury for its consideration. The verdict is substantial and it cannot be assumed or known that the amount thereof was not the result of a finding of permanent injury to and future pain and suffering by appellee.

The place of the collision was described as 5 feet east and 9 feet south of the center of the intersection. The width of the intersection from east to west was

25 feet. There were tire skid marks 15 feet long made by the automobile of appellant extending east from the place of the collision. At that time the speed of the automobile of appellant was not more than 15 miles per hour. The automobiles were each facing in a westerly direction at the time of the collision. The Hohl automobile had not completed the right angle turn into Twenty-fourth Street and appellant had turned his automobile to the left in an attempt to avoid an accident. The impact was a glancing or oblique blow and not a broadside contact of the automobiles. The right end of the front bumper and the front end of the right fender of the automobile of appellant contacted the left side of the Hohl automobile and made a considerable dent in the left door. The right headlight of the automobile of appellant was not injured. It was serviceable after the collision and needed no repair. Each of the automobiles was driven from the scene of the accident and was continued in use.

Appellant at the time of the impact experienced no jolt, bumps, or shock. His hands remained on the steering wheel and his foot continued on the brake pedal. His wife and their young son were in the front seat with appellant. They or any of them were not forced out of the normal position in the seat. There was no injury or soreness experienced by any of them because of the collision. Hohl was driving his automobile and at the time of the collision his hands were not forced off the steering wheel or his foot off the brake pedal nor was he thrown against the steering wheel.

Appellee was seated to the right of Hohl in the front seat and he did not see her position change before or at the time of the impact. Appellee testified that at the time of the collision she was sitting on the seat of the automobile and "scooted down in my seat. * * * I mean I just scooted back." She said she was not entirely knocked out of the seat. She was still sitting in it and

then she scooted back. She was not thrown against the body of the automobile. She was asked if she had any aches or pains soon after the accident and she said she could not remember any. She got out of the automobile at once after the collision and she and Hohl remained at the place of the accident for about an hour and then they got in the Hohl automobile and went to his home. Hohl said appellee while they were at the place of the accident acted normally and she made no complaint on the trip from there to the Hohl home. She told Hohl that evening she was not injured.

A police officer was at the place of the accident a few minutes after it happened. He said he made an investigation to ascertain if anyone was injured and that the persons there told him they were not injured. He said appellee did not appear unusual in any way.

Appellee said she was nauseated twice after the accident, the first time in the restroom of a filling station which she could not locate and the other time in the bathroom of the Hohl home. She was at the Hohl home about half an hour after she reached there from the place of the accident and she then accompanied Mrs. Ruth Hohl on an automobile trip to College View and back to the Hohl home. Appellee did not complain of injury or illness during that trip nor did she exhibit any symptoms of any such condition. She remained at the Hohl home until she left to engage in the duties of her employment. She worked from 11 p. m., March 2, 1958, to 7 a. m., March 3, 1958, the usual hours of her employment at the nursing home. That night she said she noticed a pain in her back and her neck was stiff. She worked the night shift at the nursing home the month of March 1958 a total of 250⅔ hours. Appellee left on a trip to Ozark, Missouri, by bus on March 3, 1958. The continuous time required to make the trip was about 18 hours. She had not sought or had medical attention since the accident until she left on that trip. She spoke of Dr. Roper of Ozark, Missouri, as her family

doctor, but she did not consult him when she reached that city. She returned to Lincoln by bus, making a continuous trip. She was away from Lincoln March 3, 4, and 5, 1958. She was not away from her employment any other time during that month. The night she returned, probably March 6, 1958, she performed the duties of her employment in the nursing home.

The first doctor appellee consulted after the accident was Dr. Norman of Lincoln on March 7, 1958. He was not a witness on the trial of the case but notes made by him and produced by an associate of his indicated that appellee told Dr. Norman of the accident, that she said she had pain over the lower spine, and that the left side of her neck was painful. She had no indication of pain down in the legs. There is no proof that Dr. Norman made any diagnosis of any condition of appellee but he did prescribe ultrasonic treatment to which she submitted. She continued doing the work at the nursing home after she saw Dr. Norman but with some difficulty. When she would bend over she said it was painful and it was difficult for her to straighten up. She said the pain in the small of her back was constant and the stiffness in her neck continued for about 3 weeks and it then improved.

Appellee consulted Dr. Ochs of Lincoln, an associate of Dr. Norman, on March 25, 1958, because of a cold and sore throat condition she had and not because of anything concerning the accident. A few days later she told Dr. Ochs of the accident. He testified that after he had seen her awhile and became familiar with her problems, "* * * I had my own feelings as to what her trouble was." He called it "a whiplash injury to the cervical spine." The treatment he prescribed was ultrasonic sound treatment, diathermy, manual massage, and a few arthritic-type medication tablets. He saw her several additional times until June 6, 1958, when he directed her to Dr. Getscher of Lincoln "Because we were not satisfied with the progress that was being

made with her complaints." Dr. Ochs saw appellee and gave her a couple of treatments after she had consulted Dr. Getscher of the same character he had given her before. Dr. Ochs last saw appellee June 20, 1958, about 11 months before the trial in which he testified.

The record made by Dr. Norman does not mention a finding of limited motion of the back of appellee, evidence of muscle spasm, or any bruise, contusion, or injury on the body of appellee. When Dr. Ochs saw appellee on March 25, 1958, he made no mention in his record of any injury she claimed to have suffered and no notation of any objective finding concerning an injury. There were X-rays taken while appellee was a patient of Dr. Ochs and they showed five or six of the vertebral bodies at the lower part of the spine which exhibited a perfectly normal lumbar spine without any disturbance with the alignment of the bodies of the bony structures thereof. They also showed the upper three lumbar vertebrae, which would be the first, second, third, and two below that, and the twelfth, eleventh, and part of the tenth thoracic vertebrae were a normal structure. Appellee on April 14, 1958, complained of a tenderness in the occipital area. Dr. Ochs believed in her case that this was the result of nervous tension rather than injury. The next day she felt relaxed but her back was still sore. There was not in the record made by Dr. Ochs any mention of appellee experiencing muscle spasms at any time or that the doctor found loss of motion in any part of the body of appellee. He found no evidence of a torn muscle or of a herniated disc in the neck or back of appellee.

Dr. Getscher, an orthopedic surgeon of Lincoln, testified he examined appellee and found she had full range of motion in the lumbosacral spine and in the joints of the lower extremities, and that all leg tests were considered to be normal. He found no evidence of muscle spasms. He resorted to other tests usual in the practice of an orthopedist and they disclosed no nerve or muscle

injury and nothing abnormal in the condition of appellee. There was no evidence of limited motion in the cervical spine or neck or a muscle spasm either in the lower back or in the neck. A neurological examination in both the upper and lower extremities was completely within normal limits, indicating the function of the nerves was normal. Dr. Getscher made a positive finding of moderate obesity and moderately poor posture of appellee. Poor posture and obesity create a problem of strain. Excessive weight on a spine that is intended to carry much less weight may very well lead to soreness of muscles and complaints of pain anywhere in the back, dependent upon the type of postural deficit and the degree of obesity. The doctor said appellee in his opinion had a problem so far as obesity and posture were concerned. Dr. Getscher found no evidence of loss of use of either of the arms or legs, of the spine, neck, low back, or in any area of the back of appellee. He said if a person sustains an injury which will eventually result in permanent damage, there would be an objective finding in the sense that a doctor could find some symptom, some disability, within 3 months of the occurrence of the accident. If there were a tearing or strain of a ligament, the healing would be by the production of scar tissue in the area of the injury and this would manifest itself so that it could be determined because scarring leads to the shortening of the muscle and would be demonstrated by range of motion or excursion of the muscle. Scarring in a ligament would likewise result in limited motion in the joints that it crossed. The fact that the examination demonstrated no limitation of motion indicates that there were no residuals evidencing that the tearing and straining of any ligament or muscle could be considered significant and probably result in permanent disability or restriction of activity.

Dr. Getscher was asked if it were possible for an individual to have sustained functional injury in that he

would experience pain and have certain limitations without there having been an organic injury. His answer was in substance that injury might be produced in an individual which results in functional loss but functions cannot be injured without injuring organic structure. Appellee demonstrated at the time of the examination witness made of her no evidence of injury in using the accepted method of examination. She did give subjective loss of functions based on subjective findings which might be the result of minor organic injury that did not show up in the type of examination that is considered necessary for the condition of this type or is considered the usual accepted procedure of examination. An individual who has a muscle that has been contused on March 2, 1958, may not demonstrate any objective findings in an examination on June 10, 1958, but still lead to complaints of pain by the individual, conditions within that muscle which are considered a normal result of an injury that far after an injury, and still provide no basis for accepting that a permanent disability will result. He said it was his opinion that appellee may be having discomfort as related by the so-called history she gave, that she may find certain duties aggravate this discomfort, and that the discomfort may be a real and distressing circumstance for her subjectively; but he said unless he could demonstrate to his satisfaction there had been significant injury which would reflect or show in an examination of the type commonly accepted among orthopedic surgeons in demonstrating post-injury conditions, he would be compelled to assume that the discomfort exists in an effort to improve her subjective condition but he would still have to reserve the right to testify that he was unable to demonstrate those significant changes that would necessarily form the basis for judging and concluding that disability is present or would result, leading to the conclusion that some minor injury cannot be adequately proven to exist at a time of examination, even though the examiner

accepts that injury and its ramifications may have existed prior thereto, and may still exist in a very minor way at the time of the examination. Dr. Getscher said he was of the opinion that the patient received strain to the neck and lower back and that she had a rather slow and incomplete recovery; that there were no objective findings of any significant organic injury at the time of the examination; that there was evidence that she was extremely disturbed emotionally; and it was thought she did have a delayed recovery complicated by moderate obesity and moderately poor posture.

Appellee consulted Dr. Roper of Ozark, Missouri, July 7, 1958. He said she told him of the accident of March 2, 1958, and that she had suffered with a pain in the lumbar region of her back since that date; that she then immediately became ill, was nauseated, and experienced pain in the lower back and in the left side of her neck; and that her back was severely twisted in the accident. Dr. Roper had a report from Dr. Ochs, including the information that X-rays of the lumbar spine and cervical spine showed that both locations were negative. Appellee told Dr. Roper that she had occasional headaches and she was nervous. Otherwise the systemic review was essentially normal. The result of a physical examination by Dr. Roper made of appellee was that she was essentially normal except she was obese and she was somewhat apprehensive. Her back and neck were normal and she had good range of motion. She said she had, and the doctor thought she had, moderate tenderness over the posterior spinous processes of lumbar vertebrae 2, 3, and 4 and a small amount laterally on the left side thereof. Her lower extremities were normal and the remaining part of the physical examination developed no abnormality in appellee. Dr. Roper testified he thought that probably she had a whiplash injury of the neck: "That's per Dr. Ochs, which responded to treatment." He was obviously referring to the report of Dr. Ochs which was

sent to Dr. Roper before appellee consulted him on July 7, 1958. Dr. Roper said concerning the supposed whiplash injury, "Oh, it's a neck injury, but that is apparently alleviated." Dr. Roper said that appellee told him when she first consulted him that the pain she suffered in her neck had been alleviated and that she had no more pain there. He said she made no complaint to him thereafter of pain in her neck. Dr. Roper prescribed diathermy and ultrasonic treatment for appellee which she accepted. Later she was treated with the Medco-Sonlator machine. There was some benefit from these treatments but she continued to complain of low back pain. On the advice of Dr. Roper appellee consulted Dr. Yancey, an orthopedic surgeon of Springfield, Missouri. In the report of Dr. Yancey to Dr. Roper of his examination of appellee he stated that he found the neck of appellee normal, no edema, no tenderness, no muscle spasm, vertebrae were in good normal alignment, no list, and normal range of motion. He put appellee on a reducing diet and recommended conservative treatment and more physiotherapy. Dr. Yancey reported to Dr. Roper that he did not believe appellee sustained a serious injury. Dr. Roper said that he found no evidence of muscle spasm, torn ligaments, or torn muscles in the back of appellee, no swelling, scar tissue, or tightness of muscles in any examination he made of appellee. Dr. Roper saw appellee at his office numerous times during the period from July 7, 1958, to and including April 22, 1959. When he last saw her she said that the pain she had was then intermittent, sometimes it was present and sometimes it was entirely absent. The conclusion of Dr. Roper was that he did not know at the time he was testifying how permanent the effects of any injury appellee sustained would be; that he did not know the permanency of disability of any injury she sustained; that he did not believe anyone could make that statement; and that he

did not know whether she would suffer pain in the future.

Dr. Carveth of Lincoln saw appellee May 18, 1959. Her complaints to the doctor were constant pain in the small of her back; intermittent pain in her neck but this condition was much improved; inability to sit for long periods; and some discomfort in the area below the skull on the left side of her neck, extending downward. Dr. Carveth gave appellee a complete physical examination. He found that her heart, blood pressure, lungs, breasts, eyes, ears, nose, and throat were all negative. Her reflexes were equally normal on both sides and this indicated that her spinal cord was normal. She claimed that when the doctor examined the small of her back by deep palpation, she had pain which extended lateralwards in that area for about 3 inches. The doctor subjected appellee to proper test to ascertain the condition of the muscles and ligaments in the small of her back. This demonstrated that she had good tone or strength and the absence of any weakness in that area. The strength of the small of the back of appellee was indicated by the absence of any reaction of the muscles, ligaments, and nerves relating thereto. She did not complain of pain occasioned by the test. The back of appellee was straight. She had normal curve and she bent laterally to the right and to the left. She was asked to bend over and touch the floor with her hands and she came within about a foot of it. There was no evidence of rigidity or spasms of the muscles of the back during this procedure and this demonstrated the absence of much disability in that area. She could turn her head and rotate it. There was no rigidity in the muscles of the neck or back. The doctor found there was no numbness or pain in her arms and no atrophy of the muscles and ligaments in the arms of appellee, and she stated to the doctor that this was true of her legs. The doctor found no swelling in her legs and she had normal range of motion of the legs. The pelvic

examination of appellee was negative. Laboratory examination showed blood count, both red and white, as normal and a normal sedimentation rate. There were X-rays taken and studied of the cervical spine, the area of the neck and back, and the low back area. There was no evidence in these of the effects of any injury to appellee. They were substantially normal. There was no indication of the presence of arthritis or pinching of the nerves. Any significant tearing or stretching of a ligament or muscle causes severe immediate pain to the subject and the injury can be determined upon examination because of resulting limitation of motion, spasm, and rigidity. Any significant injury of that kind to the low back would produce immediate pain and disability. Dr. Carveth said he found no evidence of any disability in appellee.

Appellee made a trip by bus from Lincoln to Ozark, Missouri, and return in April 1958 and in May 1958 and week-end trips to Kansas City, Missouri, the number or dates of which she could not state but all these were after the accident and before July 1, 1958. She could not testify how many hours she worked at the nursing home of Hohl in Lincoln during the period from March 2, 1958, the date of the accident, until June 29, 1958, the date she discontinued her services permanently at the nursing home. The evidence shows she worked in the course of her employment as follows: During the month of March 1958, 250⅔ hours and she was away 3 days that month on a trip; during the month of April 1958 she worked 200⅓ hours and was away on a trip 4 days that month; during the month of May 1958 she worked 128 hours and she was away on a trip to Kansas City May 5 and 6 and was away from her employment from May 19, 1958, for the balance of the month because of the illness of her father; during the month of June 1958 she worked 228½ hours and she was away 3 days that month. She discontinued her employment at the nursing home on June 29, 1958. The reason she

gave for quitting her employment was not because of health or disability conditions but because she wanted to go home and be near her little boy and her father who was ill.

Appellee continued the services of Dr. Roper until about 2 weeks before the trial of this case which commenced on May 18, 1959. She claimed she suffered pain in her back and leg and that her disability continued until and existed at the time of the trial.

The trial court in advising the jury the substance of the petition of appellee stated that she alleged that as a result of injuries caused her by the accident, her training as a nurse was terminated; that she sustained permanent impairments to her body; and that thereby she had been damaged in a substantial amount. In another part of the charge to the jury the trial court advised it that: "In fixing the amount of such damages you will take into consideration the character and extent of her injuries and disability, that is, whether the same are temporary or permanent in nature, the pain and suffering which she has already suffered, and the pain and suffering, if any, which she will undergo in the future; and you will take into consideration and allow therefor any medical expenses necessarily incurred in the treatment of her injuries, together with all future disability * * *." The applicable doctrine in this state is that the future pain and suffering which a jury may consider in determining damages are such as evidence shows with reasonable certainty will be experienced by the injured litigant as a proximate result of injury inflicted upon him and that a prerequisite to a recovery of damages for permanent injury is that the future effect of the injury on the claimant must be shown with reasonable certainty.

In McGowan v. Dresher Bros., 106 Neb. 374, 183 N. W. 560, the court observed: "A party is not required to prove permanent injury with absolute certainty, yet a mere conjecture or probability is not sufficient. The

burden of proof was on plaintiff, and the testimony must show such permanent injury with reasonable certainty. * * * Furthermore, there was no attempt to prove the degree of the future impairment in the use of the members or in the loss of earning power."

In Bresley v. O'Connor, Inc., 163 Neb. 565, 80 N. W. 2d 711, this court, in approving an instruction concerning future pain, said: "According to the medical testimony, the plaintiff would continue to suffer pain in the future for an undeterminable period. The court, by giving such instruction, did nothing more than permit the jury to make allowance for such future pain and suffering of plaintiff as might be established by the evidence with reasonable certainty, contingent upon the evidence also showing with reasonable certainty how long such future pain and suffering might continue * * *."

Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, declares: "The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person."

Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254, says: "Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury." See, also, Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308.

The record yields no evidence of the quality required to show with reasonable certainty that appellee suffered a permanent injury as a proximate result of the collision of the automobiles or that damage is reasonably certain to occur as a result of the injuries pleaded by appellee. Likewise, evidence is wholly lacking to establish with reasonable certainty that future pain and suffering will be experienced by appellee as the result of any injury inflicted on her by the accident. The in-

structions described above were prejudicially erroneous.

The judgment should be and it is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

MADELINE V. PODEWITZ ET AL., APPELLANTS, V. GERING NATIONAL BANK ET AL., APPELLEES, E. L. FUNDINGSLAND, INTERVENER-APPELLEE.

106 N. W. 2d 497

Filed December 9, 1960. No. 34807.

1. **Contracts.** Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.
2. ———. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.
3. ———. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
4. ———. The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.
5. **Vendor and Purchaser.** A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.

6. **Deeds.** A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether if sufficient remain from which the intention of the parties can be ascertained.

7. **Taxation: Deeds.** A tax deed issued under section 77-1839, R. R. S. 1943, is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. Insofar as our holding in Sherlock v. Gillis, 108 Neb. 72, 187 N. W. 812, is in conflict with the foregoing the same is overruled.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded.*

Halcomb, O'Brien, Knapp & Everson, for appellants.

Lyman & Winner and *Willard F. McGriff*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

On September 4, 1958, John Podewitz and Madeline V. Podewitz brought this action in the district court for Scotts Bluff County against the Gering National Bank and Douglas E. Jones. E. L. Fundingsland was authorized to and did intervene. The purpose of the action is to recover the sum of $1,000 placed in escrow with the Gering National Bank under and pursuant to the terms and provisions of an escrow agreement entered into between the plaintiffs and defendant Douglas E. Jones. The Gering National Bank was directed by the court to deposit the $1,000 it held in connection with the escrow agreement, together with all instruments held in connection therewith, with the clerk of the district court. This it did and by doing so, was, by order of the court, released from any further liability that might arise thereunder by reason of any and all claims by all other parties to the action. A jury was waived and, upon the issues raised and tried, the trial court found for the defend-

ant Douglas E. Jones and intervener E. L. Fundingsland and against the plaintiffs; found that plaintiffs' title to the premises involved was not merchantable so as to permit drilling operations on or before June 28, 1955; and that such requirement was not waived by defendant Douglas E. Jones or intervener E. L. Fundingsland. Based upon such findings the trial court dismissed plaintiffs' petition and rendered a judgment in favor of defendant Douglas E. Jones and intervener E. L. Fundingsland, holding them to be entitled to the $1,000 placed in escrow with the Gering National Bank, together with interest thereon at 6 percent from June 28, 1955, and costs. Plaintiffs filed a motion for new trial, which was overruled. This appeal was taken therefrom.

For convenience we shall herein refer to John Podewitz and Madeline V. Podewitz, husband and wife, as appellants; to appellee Douglas E. Jones as Jones; to appellee-intervener E. L. Fundingsland as Fundingsland; and to Jones and Fundingsland jointly as appellees. Jury having been waived we shall consider the trial court's findings accordingly insofar as the evidence adduced is concerned. See Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315, for the principles here controlling in that respect. However, as to the real questions involved the evidence is not in dispute and they present simply questions of law.

The appellants are and, at all times herein material, were the owners and in possession of Lots 23 to 34, inclusive, Park Row, of the Original Town of Harrisburg, Banner County, Nebraska, occupying it as their homestead. On March 28, 1955, they entered into an "Escrow Agreement" with Jones which, insofar as here material, provides as follows: "This escrow agreement is contingent upon the lessors furnishing merchantable title of said premises unto the lessee so as to permit drilling operation within the time hereinafter specified, otherwise in full force and effect.

"It is hereby stipulated and agreed that the afore-

said oil and gas mining lease together with the sum of $1,000.00, payable to lessors and duly signed copy of this agreement shall be placed in the Gering National Bank of Gering, Nebraska, to be held in escrow and disposed of by said bank upon the following terms and conditions:

"(1) If the lessee or his assigns shall commence for the drilling of a test well for oil and/or gas at some location upon the above described premises on or before the 28th day of June, 1955, the said bank is hereby authorized and directed to deliver forthwith the said lease and the aforesaid sum of $1,000.00 to the said lessee or his assigns.

"(3) If, however, the lessee or his assigns shall fail to comply with provision (1) mentioned above on or before the 28th day of June, 1955, the said bank is hereby authorized and directed to return said oil and gas lease to the said lessor and this agreement shall terminate and all rights, obligations and liabilities thereunder shall forthwith cease, determine and be forever at an end as to all parties. The $1,000.00 aforesaid shall also be paid by escrow agent unto lessors herein. * * * No abstracting costs shall be chargeable to lessors herein."

On the day of its execution the escrow agreement, together with the $1,000 and the oil and gas lease therein referred to, executed in triplicate, were deposited with the Gering National Bank. Jones subsequently sold all his rights in and to this escrow agreement to Fundingsland. Neither Jones, Fundingsland, nor anyone in their behalf, has ever commenced any operations on the above-described premises for the drilling of a test well for oil or gas.

Jones, for a valuable consideration, sold his rights in and to the escrow agreement to Fundingsland on May 31, 1955, making a written assignment thereof to Fundingsland dated October 20, 1958. Raymond Grant, who helped negotiate the escrow agreement for Jones, has

disclaimed any right or interest therein. Jones and Fundingsland both pleaded that appellants failed to furnish a merchantable title to said premises so as to permit drilling operations thereon on or before June 28, 1955, for the specific reasons set out in two title opinions submitted by Fundingsland to appellants and that their failure to drill a test well on the premises was because of appellants' failure to furnish a merchantable title thereto.

C. F. Fundingsland, Fundingsland's brother, a practicing attorney at Burlington, Colorado, examined the record title to appellants' property, as disclosed by an abstract of title thereto last certified to by a bonded abstracter on April 15, 1955, and made certain specific objections thereto. Thereafter, on June 20, 1955, Ernest S. Baker, an attorney practicing in Denver, Colorado, examined the same abstract and made certain observations as to why, in his opinion, the appellants could not deliver merchantable title to the premises so as to permit drilling operations thereon within the meaning of the escrow agreement. At the time of trial Jones and Fundingsland were, over objections, permitted to amend their pleadings, by interlineation, to raise two specific objections to appellants' title which were not contained in the two title opinions. These title opinions were not delivered to either of the appellants prior to June 23, 1955, when Fundingsland handed them to appellant John Podewitz although, on June 22, 1955, Fundingsland had advised appellant Madeline V. Podewitz that their title had been found defective.

Appellants contend the provision in the escrow agreement, which was prepared by counsel for Jones, that they furnish a merchantable title of the premises to the lessee is, by the language thereof, a condition precedent to the agreement becoming effective and was waived by Jones when he deposited the sum of $1,000 with the bank on March 28, 1955. The rules governing the construction of contracts, which would also apply

to the construction of an escrow agreement where one of the parties thereto has had it prepared, have been recently restated by the court in Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150; Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245; and General Credit Corp. v. Imperial Cas. & Indemnity Co., 167 Neb. 833, 95 N. W. 2d 145. Here the provision in the escrow agreement, as to furnishing merchantable title to the premises, is somewhat ambiguous. The rule relating thereto is also stated in Long v. Magnolia Petroleum Co., *supra;* and General Credit Co. v. Imperial Cas. & Indemnity Co., *supra.* As stated in Long v. Magnolia Petroleum Co., *supra:* "Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it."

There are, however, three other rules which, in view of the record, we think are here applicable. As held in Clough v. Standard Oil Co., 130 Neb. 136, 264 N. W. 170, by quoting from Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693, 116 N. W. 659: " 'In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.' " See, also, Lowman v. Shotkoski, 106 Neb. 540, 184 N. W. 107; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; O. C. Hirsch Constr. Co. v. Peterson, 167 Neb. 295, 92 N. W. 2d 694. As stated in Wilderman v. Watters, *supra:* "It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine

their meaning and intention, but not to vary or contradict the plain terms of the instrument."

In Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295, we said: "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." See, also, Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841.

The other rule applicable is stated in Edwards v. Hastings Distributing Co., 107 Neb. 621, 186 N. W. 980, by quoting from Cady v. Travelers Ins. Co., 93 Neb. 634, 142 N. W. 107: " 'The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.' " See, also, Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311; Williams v. Williams, 168 Neb. 135, 95 N. W. 2d 205.

The purpose of the escrow agreement was to give Jones, or his assigns, the right to explore for gas and oil on the appellants' premises. The drilling of a well for that purpose is expensive and a requirement to make sure that appellants had a merchantable title to the premises, in order to protect such an investment, seems only to be a reasonable requirement of the escrow agreement. That Jones had an abstract prepared for that purpose evidences his understanding of what the agreement meant. That appellants understood their obligation in this respect is evidenced by the terms of the oil and gas lease they executed and deposited in escrow wherein they warranted the title to the premises therein described. We do not think the requirement in the escrow agreement to furnish merchantable title was a condition precedent to the agreement becoming ef-

fective, but rather a provision thereof to be performed by appellants in order to protect and to secure to Jones, or his assigns, any investment made in drilling a test well thereon for the purpose of exploring for gas or oil.

Under the provisions of the escrow agreement appellants were not obligated to furnish an abstract of title to their property. In fact, the agreement provides that "No abstracting costs shall be chargeable to lessors herein." As stated in Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am. S. R. 123: "The agreement being silent upon this point, it was incumbent upon the plaintiff (here Jones or his assigns) to provide the abstract, and to satisfy himself as to the condition of the title." See, also, Boekelheide v. Snyder, 71 S. D. 470, 26 N. W. 2d 74; Budwit v. Herr, 339 Mich. 265, 63 N. W. 2d 841.

Under the escrow agreement it was appellants' duty to furnish a merchantable title to their premises. In view of that fact it was their duty to cure or correct any defects therein within a reasonable time after such defects, if valid, were called to their attention. That is, furnishing a merchantable title thereto means to have such title and to comply with any reasonable request by Jones, or his assigns, with reference to the proof thereof so as to permit the commencing of drilling operations thereon with safety. On the other hand it was the duty of Jones, or his assigns, to have the title thereto examined within a reasonable time after the escrow agreement was entered into and, if they had any objections thereto, to inform the appellants thereof as soon as possible so they could, if they thought such objections valid, attempt to cure or correct them and thus permit the escrow agreement to be performed within the time therein specified. However, no affirmative duty rested upon the appellants in this respect under the provisions of the escrow agreement until some specific complaint was made to them as to why their title was not merchantable. See, Justice v. Button, 89 Neb.

367, 131 N. W. 736, 38 L. R. A. N. S. 1; Easton v. Montgomery, *supra;* Chandler v. Gault, 181 Wis. 5, 194 N. W. 33.

In view of the fact that the escrow agreement provided only 3 months (92 days) to commence drilling a test well for oil and gas it was Jones', or his assigns', duty to obtain an abstract, have it examined, and advise appellants of defects therein, if any, within a reasonable time. See, Easton v. Montgomery, *supra;* John v. Timm, 153 Minn. 401, 190 N. W. 890; McKay v. Ryan, 204 Minn. 480, 284 N. W. 57. Jones secured an abstract to the premises certified to by a bonded abstracter as of April 15, 1955. Fundingsland had the abstract examined by his brother who, by an opinion dated May 20, 1955, found the title defective as did Ernest S. Baker in his opinion dated June 20, 1955. Fundingsland notified the appellants of this fact not earlier than June 22, 1955, or some 6 days before the time to commence drilling would expire and some 85 days after the escrow agreement was entered into. Appellants contend that by doing so appellees waived any right to object to the quality of appellants' title, which they might otherwise have had. In view of the provisions of the escrow agreement Fundingsland, by making the objections as late as he did, did not thereby waive the right to make them but did waive any right to a performance thereof by appellants within the period of time fixed by the escrow agreement therefor and thereby gave appellants a reasonable time to cure or correct any claimed defects, even though doing so would extend performance on their part beyond June 28, 1955, and that right would include curing such defects by an action based on adverse possession. See, Miller v. Ruzicka, 109 Neb. 152, 190 N. W. 216; Gilmore v. Cover, 134 Neb. 559, 279 N. W. 177; Klapka v. Schrauger, 135 Neb. 354, 281 N. W. 612; Easton v. Montgomery, *supra;* 55 Am. Jur., Vendor and Purchaser, § 273, p. 719, § 274, p. 720. But if the owners, as appellants did here, decide to stand

on the title they have and it is actually defective in the manner contended for, they, of course, lose their rights under the parties' agreement but, on the other hand, if the objections made are without merit and the title is good the reverse would be true. See, White v. Evans. 120 Colo. 200, 208 P. 2d 922; 55 Am. Jur., Vendor and Purchaser, § 275, p. 720.

A merchantable title has been defined by this court in Northouse v. Torstenson, 146 Neb. 187, 19 N. W. 2d 34, as: "A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser." See, also, Perry v. Ritze, 110 Neb. 286, 193 N. W. 758; Shonsey v. Clayton, 107 Neb. 695, 187 N. W. 113; Justice v. Button, *supra;* Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790. As stated in Shonsey v. Clayton, *supra:* "* * * a title to be good or marketable must be free from reasonable doubt either in law or fact."

In Baker's opinion of June 20, 1955, he objected to the title furnished not being merchantable so as to permit the lessee, or his assigns, to begin drilling operations thereon on the fact that the tract did not contain 10 acres. It is apparent, from a letter of the State Geologist dated June 8, 1955, that he had not and would not, under the rules and regulations he had promulgated, approve an application to drill a well for the purpose of discovering gas or oil on a tract of less than 10 acres. Appellants' lots had an area of about 7 acres. The record discloses that Jones, a consulting petroleum engineer, while he and Raymond Grant were negotiating with appellants for a lease at the latter's home in Harrisburg on March 27, 1955, was informed by appellant John Podewitz that these premises contained only about 7 acres and that, because of that fact, he didn't think a permit could be obtained to drill a well thereon for gas or oil. When so informed Jones replied they didn't need 10 acres for that purpose. Fundingsland was aware

of the fact that the tract contained less than 10 acres when he handed Baker's opinion to appellant John Podewitz on June 23, 1955, for Fundingsland then told him he needed a few more acres to make a 10-acre tract and would need an extension of time and cash to obtain it. While Jones and Fundingsland pleaded this opinion of Baker as one of the reasons why appellants did not have a merchantable title within the meaning and intent of the escrow agreement, and offered the opinion and supporting data as evidence in support thereof, we do not think, in view of certain principles hereinbefore set forth, that the parties, when they negotiated the escrow agreement, considered the acreage in the tract as any requirement insofar as appellants were required to furnish a merchantable title thereunder. We do not think this objection to appellants' title has any merit and, on appeal, appellees do not contend that it does.

As to the objections to the title of appellants raised by the opinion of C. F. Fundingsland, which were pleaded as a reason why appellants did not have a merchantable title, all are abandoned on appeal except one. We have examined all of the objections to the title raised by that opinion and find them to be without merit, including that raised on appeal which relates to a tax deed from the treasurer of Banner County to J. M. Wilson, dated February 3, 1915, which describes the property conveyed as "Lots 23, 24 & 25 in Block 33, Park Row, Town of Harrisburg, State of Nebraska." Appellees contend the description is ambiguous because the conveyance included "Block 33." The plat of Harrisburg, which is part of the abstract of title which C. F. Fundingsland examined, shows that the original town of Harrisburg does contain a Block 33, however said Block 33 does not contain any Lots numbered 23, 24, or 25. There is, however, a Park Row containing such lots although it does not contain a "Block 33." Under this situation we think what was said in Hart v. Murdock, 80 Neb. 274, 114 N. W. 268, has application here. There-

in we said: "A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether, if sufficient remain from which the intention of the parties can be ascertained." The same is true of the county treasurer's tax deed to Ruby Wilson, dated January 15, 1917, which conveys to her Lots 26, 27, 28, 29, 30, 31, 32, 33, and 34, "Park Row, (Blk 33) in the Village of Harrisburg, Banner County, Nebraska." We think the inclusion of Block 33 in both conveyances is mere surplusage.

At the time of trial, which commenced on November 19, 1959, appellees were, over objection, permitted to raise two additional objections to appellants' title. Appellants contend that the trial court erred in so doing. This contention is not without merit. See, Brown v. Security Mutual Life Ins. Co., 150 Neb. 811, 36 N. W. 2d 251; Ballou v. Sherwood, *supra;* Easton v. Montgomery, *supra;* Vangsness v. Bovill, 58 S. D. 228, 235 N. W. 601; Durband v. Ney, 196 Iowa 574, 191 N. W. 385; John v. Timm, *supra;* Condit v. Johnson, 158 Iowa 209, 139 N. W. 477. However, we shall consider these two objections on their merit for reasons which will hereinafter become apparent.

Appellees contend appellants' title to the premises in question is defective because of the doubtful situation surrounding the delivery of the deed from John M. Wilson and Ruby Wilson to Irene L. Podewitz and John Podewitz, Jr., dated April 15, 1942, and recorded on June 19, 1945, in the county clerk's office of Banner County in book 12, deed records, at page 333. It is, of course, essential to the validity of a deed that there be a delivery thereof in the lifetime of the grantor. Lewis v. Marker, 145 Neb. 763, 18 N. W. 2d 210; Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182. This deed was executed by both John M. Wilson and Ruby Wilson on April 15, 1942, but was not acknowledged until May 25, 1945, after John M. Wilson had died. The acknowl-

ment was made upon the affidavit of J. G. Shaul, a witness thereto, under and pursuant to the authority and procedure provided for doing so by section 76-228, R. R. S. 1943. Ruby Wilson also filed an affidavit stating the deed was executed and delivered to the grantees. Within the intent and meaning of this statute, as evidenced by our opinion in Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147, when section 76-228, R. R. S. 1943, has been fully complied with, the question of the execution and delivery of this deed is established.

Appellees also contend the tax deed from the treasurer of Banner County to J. M. Wilson, dated February 3, 1915, did not meet the statutory requirement as to a recital of a public sale prior to the private sale and therefore absolutely void. That such was the law prior to 1903 is evidenced by our holding in Ludden v. Hansen, 17 Neb. 354, 22 N. W. 766, wherein we said: "A tax deed purporting to have been issued on a private sale must contain a recital that the land had been previously offered for sale for such taxes at public sale, and not sold for want of bidders." However, in 1903, the Legislature passed an act to provide a system of public revenue and repealed the old laws relating thereto. See Laws 1903, c. 73, p. 389. In Opp v. Smith, on rehearing, 102 Neb. 155, 169 N. W. 716, we said: "That act (Laws 1903, c. 73) does not require that the deed contain a statement that the land had first been offered at public sale." See, also, § 77-1839, R. R. S. 1943. Such is now required to be contained in the tax sale certificate when the land is sold for taxes at private sale. See § 77-1814, R. R. S. 1943. However, the act of 1903 contained a saving clause, section 242, which saved to the parties purchasing land at tax sales held prior to the passage thereof all rights, vested or otherwise, extended to them by the statute in force when the purchase was made. See, Laws 1903, c. 73, § 242, p. 479; Whiffin v. Higginbotham, 80 Neb. 468, 114 N. W. 599. That was the principle controlling of the facts in Wells v. Bloom,

96 Neb. 430, 147 N. W. 1112, and Opp v. Smith, *supra*. However, in Sherlock v. Gillis, 108 Neb. 72, 187 N. W. 812, although the tax sales therein involved were executed long after the act passed by the 1903 Legislature had become effective, we continued to follow our holding in Ludden v. Hansen, *supra*. In doing so we think the court was in error and our holding therein to that effect is overruled. The correct holding is that section 77-1839, R. R. S. 1943, does not require that a tax deed contain a statement that the land has been offered at public sale. All it requires is a statement in the deed as to whether the sale has been public or private.

Under the record before us the appellants would be entitled to a judgment notwithstanding the verdict (here the court's decision, jury having been waived) if proper procedures had been followed in the trial court for that purpose. However, only a motion for new trial was filed by appellants and our authority is limited accordingly. See Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. We therefore reverse the judgment of the trial court and remand the cause to it with directions that appellants be granted a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

IN RE ASSESSMENT OF THE PERSONAL PROPERTY OF L. J. MESSER COMPANY, A CORPORATION.

L. J. MESSER COMPANY, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF JEFFERSON COUNTY, NEBRASKA, ET AL., APPELLEES.

106 N. W. 2d 478

Filed December 9, 1960. No. 34822.

1. **Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo.

2. Taxation. The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value.
3. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the board becomes one of fact based upon evidence unaided by presumption.
4. ———. Section 77-1231.01, R. R. S. 1943, requires the taxpayer to furnish information as to his federal income tax return. This section does not stipulate that the information so furnished shall constitute the conclusive actual value of the property to be taxed.
5. ———. Section 77-112, R. R. S. 1943, sets forth a formula to be followed by the taxing authorities in taxing property. Such section is applicable to personal property as well as real estate, and should be considered by the taxing authorities in taxing either real or personal property.

APPEAL from the district court for Jefferson County: ERNEST A. HUBKA, JUDGE. *Reversed and remanded with directions.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha*, for appellant.

Melvin Moss, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an appeal taken by the L. J. Messer Company, a corporation, plaintiff, from the finding made by the County Board of Equalization of Jefferson County, defendant, to the district court for Jefferson County as provided for in section 77-1510, R. R. S. 1943. After hearing before the trial court, judgment was rendered in favor of the defendants, and the plaintiff's petition

was dismissed. The plaintiff filed its motion for new trial which was overruled by the trial court. The plaintiff perfected appeal to this court.

For convenience we will refer to the L. J. Messer Company, a corporation, as the plaintiff, and to the County Board of Equalization of Jefferson County as the board.

This appeal contests the correctness of an adjudication made by the district court for Jefferson County in sustaining the conclusion of the board which determined the valuation of the tangible personal property of the plaintiff for taxation purposes to be $31,165.

The petition of the plaintiff on appeal, insofar as necessary to consider, alleged that the plaintiff is and was the owner of a stock of merchandise located at 520-524 Fourth Street, Fairbury, Nebraska; that on March 1, 1958, the actual value of said stock of merchandise and inventory of said store did not exceed $25,666; that the plaintiff returned the actual value of said inventory upon its business schedule for the year of 1958, as required by law; and that on May 20, 1958, the board notified the plaintiff it had changed the actual value of said inventory as shown on the schedule from $25,666 to $31,165. The plaintiff further alleged that a transcript of the proceedings before said board was filed with the petition on appeal and made a part thereof; and that notice of appeal and bond were given as required by law for appeal from the ruling of said board. The plaintiff further alleged that the order and finding of said board was unjust, arbitrary, discriminatory, and in violation of law, and fixed the valuation in excess of the actual value of said property. The plaintiff further alleged that the value so fixed by the board was not based upon any evidence or information properly known to the board and without any consideration of the evidence; that the valuation made by the board was based wholly upon plaintiff's income tax return to the United State government; that the valuation shown upon said

income tax return was not the actual value of said stock of merchandise; that although the statute of the State of Nebraska required a copy of the income tax return to be filed, which was done by the plaintiff, the statute in no manner required that the copy of such return so furnished should constitute conclusive evidence of the actual value of the property for assessment purposes; and that the actual value of said property did not exceed the sum of $25,666. Plaintiff prayed that the valuation fixed by the said board be declared erroneous and illegal.

The defendants' answer to the plaintiff's petition on appeal admitted that the plaintiff was a corporation and the owner of stock and inventory of merchandise as alleged in the plaintiff's petition; that the plaintiff made a return of the stock of merchandise and inventory in the sum of $25,666; and that after due notice the board changed the assessment of said inventory from $25,666 to its actual value of $31,165. The defendants' answer denied that the finding of the board was unjust, arbitrary, discriminatory, and in violation of law, and alleged that the valuation assessed by the board was fair and reasonable. The defendants' answer denied every other allegation of the plaintiff's petition not specifically admitted, and prayed that the plaintiff's petition be dismissed.

The pertinent assignments of error set forth by the plaintiff are as follows: The trial court erred in failing and refusing to find that the valuation fixed by the board was contrary to the law and to the evidence; and the trial court erred in failing and refusing to find that section 77-1231.01, R. R. S. 1943, does not conclusively make the taxpayer's income tax inventory report figures the actual value thereof for tax purposes.

An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo. See, LeDioyt v. County of Keith, 161 Neb. 615, 74 N.

W. 2d 455; Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606; Collier v. County of Logan, 169 Neb. 1, 97 N. W. 2d 879.

The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value. See, LeDioyt v. County of Keith, *supra;* Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996.

In Collier v. County of Logan, *supra,* this court held: "The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. * * * However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such values to be unreasonable resting upon the party complaining."

Section 77-1231.01, R. R. S. 1943, provides in part: "As part of the return of the business schedule, for taxation, there shall be attached thereto a certified statement of the dollar amount of the inventory at the end of the fiscal year as set out in the taxpayer's latest federal income tax return, * * *. The taxpayer shall also report in his business schedule the method of determining the inventory value in the certified statement attached thereto which he reported to the Director of Internal Revenue and the date of latest physical inventory." The statute then provides a penalty for failure to comply with the provisions thereof.

Section 77-1236, R. R. S. 1943, which was enacted in 1903, provides: "For the purpose of determining the true value of the stock of any merchant or manufacturer, the assessor shall have the right to demand of such

merchant or manufacturer an inspection of his inventories and all books of accounts for the preceding year, including the annual invoice and inventory of stock made by such merchant or manufacturer last preceding such assessment and the policies of insurance carried by such merchant or manufacturer on his stock for the year next preceding his assessment."

Section 77-201, R. R. S. 1943, provides in part: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value * * *."

Section 77-112, R. R. S. 1943, provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade."

The above authorities and cited statutes are applicable to the instant case.

This brings us to a summary of the evidence.

The record discloses that the plaintiff filed with the county assessor of Jefferson County form 2a for tax assessment purposes, showing inventory values on its federal income tax return in the amount of $34,214.64, and after making adjustments for purchases and sales from December 31, 1957, to March 1, 1958, the book value of plaintiff's stock of merchandise was shown as $36,666.94. The dollar amount shown by plaintiff's inventory at the end of the fiscal year was as above stated, $34,214.64. The date of the latest physical inventory was shown as November 30, 1957. The method used in determining the book value of the closing inventory was "Cost or Market" which will hereinafter be explained more fully by other evidence. The plaintiff claimed for obsolescence and depreciation 30 percent, or $11,000.08,

making the actual value of the inventory of the plaintiff's stock of merchandise $25,666.86. This value was changed by the assessor to $31,165, and the assessor stated in a letter to the plaintiff that 30 percent obsolescence was double what it should be, and allowed 15 percent to the plaintiff for obsolescence.

A witness who was the automotive purchasing agent for the plaintiff and had been since 1931, testified that he supervised the buying in the various stores of the Messer corporation, 15 in number, supervised the inventories, and had control of the equipment and various other matters that were incident to the inventories; that he was familiar with the manufacturers of the type of merchandise purchased by the plaintiff and the value of the same; that the Messer Company handled all automotive parts such as pistons, rings, valves, transmissions, differentials, axles, body repairs, and other items; and that it was the policy of the plaintiff to try to carry parts to cover every automobile, and to stock all commodities with reference thereto when service would be needed on such automobiles or other vehicles. This witness further testified that in addition to carrying merchandise for older models of automobiles, the plaintiff was required to purchase parts for new automobiles without being able to tell whether or not such parts would be salable. This witness also testified that when new automobiles were put on the market the plaintiff endeavored to obtain information on the same for services that might be rendered by it, and without knowing what such automobiles might require, the plaintiff bought, at a minimum, 30 percent of items that would never be salable. This witness further testified that because of the number of inventories the plaintiff was required to take in its 15 stores, a crew of men was used for this purpose. An inventory was taken of the plaintiff's Fairbury store on November 30, 1957, and from November 30, 1957, to December 31, 1957, there would be merchandise added to the stock, minus the sales of merchandise up to Decem-

ber 31, 1957. That is how the final figure of the inventories is arrived at. There are roughly 32,000 items, and each item is counted. This witness testified that it would be physically impossible to examine each item, but this witness checks the items as the same appear on the shelves in the store; and that no attempt is made at that time to evaluate the merchandise as to whether it is salable merchandise, because that would be impossible, due to the number of stores that must be inventoried and the fact that every item in each store is counted. This witness further testified that there were a large number of obsolete items such as fan belts, tractor valves, piston rings, axle shafts, car springs, shock knees, transmission gears, connecting rod bearings, etc., which are considered to be obsolete. This witness further testified that there was no inventory that was worth more than 50 percent of the book value of the merchandise; and that insofar as the plaintiff's operations were concerned, there was no way of taking the plaintiff's inventory to allow for the age of all the products or items that were on the shelves, and while such items were carried in the inventory at cost, they were actually decreased in value from 30 to 40 percent after the first year they were carried in stock. This witness further testified that in his opinion the actual value of the stock in the plaintiff's store in Fairbury as of March 1, 1958, was not more than $18,000; that jobbers constantly offer stocks of this type of merchandise for sale at discounts of from 30 to 50 percent below cost; and that all jobbers do not count their merchandise or items of stock on the shelves.

L. J. Messer testified that he had been engaged in the business of automotive parts, motor rebuilding, and machine shop operation since 1920; that there were different methods of taking inventories of automotive parts, and not all concerns take their inventories in the same way; that generally a stock of merchandise will sell at from 30 to 50 percent of the jobber's cost; that stocks

of merchandise have different values in different locations; that plaintiff specializes in "hard parts" for automobiles and tractors; and that the automotive parts business is different from other distributing businesses in that it does not lend itself to the use of sales and is confronted with a heavy obsolescence problem.

The county assessor testified that the valuation placed by him was based entirely upon the income tax figures of inventories as shown on form 2a; and that no method of ascertaining how the respective federal income tax inventory figures were arrived at by the individual taxpayer was used or known to the assessor or the board. The assessor further testified that the sale price of merchandise was not accepted as the value of same for tax purposes, and the cost price did not necessarily determine the actual value of merchandise; that the taxpayer was not required to bring in his income tax return to show whether the figure shown on the form 2a was correct or not, and no check was made to ascertain the manner in which the taxpayer arrived at the figures thereon, that is, whether the taxpayer had taken off any depreciation before making the federal income tax return; that whatever the merchant reported on his income tax return was accepted; and that this was the way the board assessed for the year 1958. The assessor further testified that in his opinion section 77-112, R. R. S. 1943, was more applicable to real estate than anything else and it was not applied to personal property because it was not applicable; and that the sole and only factor used by the board in arriving at the valuation of the inventory was the income tax figure, and this was uniformly applied by the board to all businesses in the county.

A certified public accountant, a partner of Peat, Marwick, Mitchell & Company, a large accounting firm in the United States, testified that he had been the auditor for the plaintiff corporation since 1930, and in addition had done a great deal of work in the field of wholesale and retail operations and was familiar with the methods

of accounting used therein. This witness further testified that he was familiar with the preparation of balance sheets and the examination and interpretation of such operations, including the balance sheet used in the preparation of federal income tax returns. This witness testified that the plaintiff's income tax returns for the years it had been in business had been taken on the same consistent basis, designated as "last in, first out"; that in addition to the "last in, first out" method of taking inventory there is another known as the "first in, first out" method; that the results of the two methods are not the same and do not show the same book value for the same physical inventory; that the "last in, first out" method of inventory is that in which the most recent purchases are charged to expense instead of the first or original purchases, whereas the "first in, first out" type of inventory would result in a valuation on a rising market of about 50 percent less than the amount shown by the "last in, first out" method; and that taking the same number of items, and depending upon the particular method used, you would arrive at different results as to book value. This witness further testified that the value of the stock of merchandise shown upon the balance sheet does not represent in fact the actual value of such inventory; that the inventory as shown upon the balance sheet for income tax purposes is not intended or desired to reflect the actual value of the merchandise; that the only way that the actual value of a stock of merchandise could be determined is by an investigation and examination by experts of the actual stock in question; that the balance sheet figures are generally not acceptable as the true indication of the actual value; and that the figures shown on the income tax return had no bearing on the actual value of the taxpayer's merchandise. This witness further testified that there are always items of obsolescence in any stock of merchandise that cannot be ascertained until the merchandise is actually sold or until the business is liquidated; that every business gath-

ers up unrealized losses in its inventory, being items of the inventory which will require a long period to sell or which may not be salable at all; that the slow-moving or obsolete items do not show up on the income tax return figures; and that the plaintiff was engaged in a peculiar type of business wherein price reductions would not assist in moving unsalable merchandise. This witness further testified that he was familiar with the fact that in case of the sale of a business, generally most sales end up on the basis of a discount of the book value of the inventory running to from 40 to 60 percent of the inventory figure.

A partner in the Fairbury Auto Parts Company, called by the defendants, testified that the business he engaged in was in competition with the business carried on by the plaintiff. He testified that the property of the Fairbury Auto Parts Company was listed for assessment on March 1, 1958, and in listing such business for assessment the assessor was furnished a statement such as that furnished by the plaintiff for the year 1957. With reference to parts and equipment which are not readily movable and may be classed as obsolete, this witness testified that the government permits a part of it to be written off; that the government does not permit the use of a percentage figure on deducting the inventory, that is, that it must be shown at what the items actually cost or at market value; that in making the inventory when there was an item difficult to sell, or obsolete, this item was entered at a determined valuation irrespective of the cost, and might show up on the inventory as a zero figure or at some other depreciated figure below cost; and that the Fairbury Auto Parts Company wrote off the obsolescence before the final figure or inventory taken by the partnership. This witness also testified that the Fairbury Auto Parts Company did 40 percent of its business in electrical supplies, air conditioning, and farm supplies. The plaintiff does not handle this type of merchandise.

To show the corroboration of the plaintiff's evidence by this witness called by the defendants, attention is called to his testimony as follows: "Q. And you pay on the inventory basis as listed in your Federal tax return? A. Yes. Q. And as in that form? A. That's right, even though I knew it was too high. * * * Q. And when you took your inventory you adjusted in the inventory for the obsolete merchandise that was dead? A. Yes. * * * Q. Would you say that that inventory figure that you came up with, would this represent the fair market value of your stock of merchandise, * * *? A. No. Q. Would that be more or less than the fair market value of your merchandise? A. More. Q. In other words, the inventory that you showed was in your opinion, then, actually more than the fair market value of your stock of merchandise? A. Right. * * * Q. So you would have returned approximately about half of what Mr. Winslow (the county assessor) made you return? A. Yes, sir."

A representative of the plaintiff testified, when called by the defendants, to the effect that the plaintiff carried a type of fire insurance whereby it is required to report 100 percent actual value; and that this report figure is arrived at entirely from the books of the plaintiff and does not represent the actual value for the reason that it is impossible to ascertain the actual value of merchandise each month, whereas the policy required the figure to be sent in each month.

An exhibit in evidence discloses that the plaintiff reported its insurance value at 100 percent at $36,329.39, on February 28, 1958.

It is apparent that the only reason the county taxing authorities refused to accept the plaintiff's evidence, which is in no way disputed, was that they believed that section 77-1231.01, R. R. S. 1943, imposed a mandate that the value shown on the inventory for federal income tax purposes must be accepted as the actual value of the property.

Section 77-1231.01, R. R. S. 1943, does require that in-

formation as to the federal income tax return be furnished. However, it is evident from a reading and analysis of such section that it does not stipulate that the information so furnished shall constitute the conclusive actual value of the property.

Section 77-1236, R. R. S. 1943, provides for an inspection of inventories and books of account, including annual inventories and policies of insurance. This section of the statutes has been in existence and on the statute books since 1903, and stands on an identical footing with section 77-1231.01, R. R. S. 1943.

Both of said sections of the statutes require the information to be furnished for the benefit of the taxing authorities, and so that the information therein may be weighed in arriving at the determination of what is the actual value, but neither of these statutes ever was intended to provide that the book value must be conclusively taken to be the actual value.

It appears that in the instant case the evidence discloses that the book records did not constitute a record of the true actual value of the property for the reason that in making up such book records the plaintiff's bookkeeping system did not allow for the taking of depreciation and obsolescence. Consequently, the information called for by section 77-1231.01, R. R. S. 1943, and section 77-1236, R. R. S. 1943, does not furnish the criterion as to the actual value to be placed on the stock of merchandise in question.

The record shows that the county taxing authorities did not consider the provisions of section 77-112, R. R. S. 1943, in arriving at the value of the stock of merchandise in the plaintiff's store at Fairbury.

As we read section 77-112, R. R. S. 1943, it applies to personal property as well as real estate, because it requires that in arriving at the actual value of property there shall be considered, among other matters, desirability and functional use, reproduction cost less depreciation, comparison with other property, and market

value in the ordinary course of trade. Section 77-112, R. R. S. 1943, was amended at the same session of the Legislature as section 77-1231.01, R. R. S. 1943, was enacted, and is just as controlling upon the county taxing authorities as is section 77-1231.01.

As we view the record, the evidence of the plaintiff was clearly sufficient to overcome the presumption that the board, in making the assessment, acted upon sufficient competent evidence to justify its action. However, the defendants offered no competent evidence to overcome the evidence of the plaintiff.

In the light of the foregoing, the judgment of the district court should be reversed and the cause remanded with directions that judgment be rendered fixing the actual value of the plaintiff's stock of merchandise for taxing purposes at $25,666.

REVERSED AND REMANDED WITH DIRECTIONS.

SECURITIES ACCEPTANCE CORPORATION, A DELAWARE CORPORATION, ET AL., APPELLANTS, V. ROBERT M. BROWN, APPELLEE.

106 N. W. 2d 456

Filed December 9, 1960. No. 34832.

1. **Contracts.** At common law all contracts in restraint of trade were against public policy and void.
2. ———. A contract which imposes partial restraint upon the exercise of a trade, business, or occupation is not unreasonable when it is ancillary to an actual transaction involving property, business, or employment made in good faith and is necessary or appropriate to afford fair protection to the one in whose favor the restriction is made. Such a contract will be respected and enforced.
3. ———. The law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used.
4. ———. However, such contracts should receive a reasonable

construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.

5. **Estoppel.** The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.

6. **Injunction: Contracts.** Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression.

7. **Contracts.** A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business.

8. ———. There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

9. **Appeal and Error.** The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns.

10. **Injunction: Contracts.** Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services.

11. **Contracts.** If the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge

of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.

12. ———. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void.

13. ———. The general rule is that a contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space.

14. ———. However, where the conditions therein appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced although they are only limited as to either time or space.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Matthews, Kelley & Stone and *Baskins & Baskins*, for appellants.

McGinley, Lane, Shanahan & McGinley, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

On August 26, 1959, Securities Acceptance Corporation, a Delaware corporation, brought this action in the district court for Lincoln County against Robert M. Brown, a former employee, for the purpose of enjoining him from breaching certain restrictive or non-competitive provisions of an employment contract which he had entered into with it. Subsequent thereto, and before trial, leave was granted to make Securities Acceptance Corporation of North Platte, a Nebraska corporation, a party plaintiff and that was done. On September 4, 1959, a hearing was held on plaintiffs' application for a temporary injunction and it was denied. Thereafter,

upon the issues raised and tried, the trial court found generally for the defendant and against the plaintiffs, held the restrictive provisions in the parties' employment contract to be void, and dismissed plaintiffs' petition. Plaintiffs thereupon filed a motion for new trial, which the trial court overruled. This appeal is from that order.

For convenience we shall herein refer to appellant Securities Acceptance Corporation, a Delaware corporation, as Securities Acceptance; to appellee Robert M. Brown as Brown; and to appellant Securities Acceptance Corporation of North Platte, Nebraska, a corporation, as Securities Acceptance Corporation of North Platte.

The action, which primarily seeks injunctive relief, is equitable in its character and, on review, will be considered de novo. See, Tarry v. Johnston, 114 Neb. 496, 208 N. W. 615; Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541; Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172; Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245. In view of that fact we will reach an independent conclusion without referring to the findings of the district court.

Securities Acceptance is primarily engaged in the consumer loan and finance business although it also does some insurance business. Its home, or main office, is located in Omaha, Nebraska. It opened a branch office in North Platte, Nebraska, in 1947 and has continued to conduct such business there ever since. Some of the business in the North Platte office is done in the name of Securities Acceptance Corporation of North Platte, a wholly owned subsidiary of Securities Acceptance. However, Securities Acceptance directs all policies, conducts all activities, and hires and pays all employees in the North Platte office, including Brown while he worked therein.

Sometime prior to March 11, 1952, Securities Acceptance employed Brown to work in its North Platte office.

This contract of employment was entered into verbally. He began such employment as credit and collection manager on March 11, 1952, at a salary of $325 per month. Immediately prior thereto Brown had been working for Commercial Credit Corporation in Salina, Kansas. Commercial Credit Corporation is also engaged in the financing of loans and Brown had been working for it since December 1, 1949. On July 16, 1952, his salary was increased to $350 per month.

Sometime in August of 1952, Securities Acceptance sent Brown a written contract covering his future employment with it. This contract was in behalf of Securities Acceptance and its subsidiaries. Brown voluntarily signed this agreement and returned it to the Omaha office of Securities Acceptance. It was also executed by Securities Acceptance. It is dated August 28, 1952, and provides, insofar as here material, that:

"V. The Employee, unless especially instructed by the Employer to disclose the facts, in which event he will comply strictly with said instructions, will keep secret from every person the names of past, present and prospective borrowers, security holders, and all other business customers and associates of the Employer, together with all knowledge which he may at any time acquire during his employment as to such subjects and as to any loans, earnings, finances, and all other concerns of the Employer.

"VI. The employee will not furnish to any other person or retain or use any papers or information whatever concerning any of the subjects and matters referred to in paragraph V.

"VII. All the terms of paragraphs V and VI shall remain in full force and effect for three years after the termination of the employment provided for in this contract; and, during the whole of said period, the Employee will not make or permit to be made any public announcement that he was formerly connected with the Employer.

"VIII. For a period of eighteen months after the termination of his employment for any reason, provided such termination shall take place not less than six months after the date hereof, the Employee will not engage in any way directly or indirectly in any business competitive with the Employer's business, nor solicit or in any other way or manner work for or assist any competitive business in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer."

After Brown signed this written contract of employment with Securities Acceptance, dated August 28, 1952, he continued on as credit and collection manager in its branch office at North Platte. Effective as of October 1, 1953, his salary was increased to $375 per month, and, as of July 15, 1954, to $390 per month. Thereafter, effective as of April 1, 1955, he was promoted to branch manager of the North Platte office. While his salary was reduced to $350 per month upon becoming branch manager he was thereafter, as a part of his pay, given a bonus, which was dependent upon profits. For the balance of that year his bonus was $947.96. He continued as branch manager of the North Platte office until June 1, 1959. During the interim his salary was raised on January 1, 1956, to $400 per month; on August 1, 1956, to $425 per month; on January 1, 1957, to $460 per month; on January 1, 1958, to $475 per month; and on January 1, 1959, to $500 per month. During this same period of time the bonus arrangement, based upon profits of the office, continued. In 1956 his bonus was $2,044.56; in 1957 it was $1,671.33; in 1958 it was $1,519.52; and up to June 1, 1959, it was $590.02. As branch manager of the North Platte office Brown had full control and was in complete charge of all operations therein. He operated it under Securities Acceptance policies and procedures and became fully acquainted therewith, as well as with the customers doing business with Securities Acceptance and its subsidiaries in and through that office.

Effective as of June 1, 1959, Brown was promoted to the position of a supervisor at a flat salary of $675 per month. This position required him to work out of the home office in Omaha. For this purpose he came to Omaha but did not bring his family with him, leaving them in North Platte. His family then consisted of himself, his wife, and three small children. During the time he continued in the employ of Securities Acceptance as a supervisor, which was up to July 15, 1959, he was not assigned any regular territory over which he was to act as a supervisor for he had to go through a training period to acquaint himself with the work of the position. This training consisted of going with one of the regular supervisors and learning the duties of a supervisor from him. It should here be mentioned that Securities Acceptance had some 89 branch offices in some 15 states to which 6 supervisors were assigned, each having supervision of a certain number of these branch offices for which they were responsible. During this period Brown spent a week in connection with the branch office at Norfolk, Nebraska, a week in connection with the branch office in Winner, South Dakota, and 2 weeks in connection with 1 of the 4 branch offices in Omaha. The balance of the time he spent in the home office. On July 13 and 14, 1959, Brown talked with certain officers of Securities Acceptance and told them he was going to quit as of July 15, 1959, and did so. He gave as a reason for doing so that the driving he would have to do in connection with his work as a supervisor would be more than his back could stand. However, he also told them he was going to work for the North Platte Loan and Finance Company in its office in North Platte, stating he had an opportunity to invest up to $35,000 therein, and asked if Securities Acceptance expected to enforce the restrictive provisions of his employment contract with it if he did so.

While operating out of the home office of Securities Acceptance during the 6-weeks' period Brown drove to

North Platte to be with his family on four or five different weekends. During the latter part of June, or forepart of July, Brown, while in North Platte over a weekend, called Mr. George Larkin of the North Platte Loan and Finance Company on his own volition. The purpose for calling Mr. Larkin was to discuss with him the possibility of being employed by the North Platte Loan and Finance Company in its North Platte office. It should here be stated that North Platte Loan and Finance Company is engaged in consumers loan and finance business and in insurance business in North Platte in competition with Securities Acceptance. As a result of Brown's call he had two visits with Larkin on two different weekends. One of these took place in Brown's home, the other in Larkin's. Not only was salary discussed at these meetings, but also the question of Brown buying into the company. Thereafter, on July 17, 1959, after Brown had quit his employment with Securities Acceptance, Brown and Larkin had a further discussion in North Platte which resulted in Brown being employed by North Platte Loan and Finance Company to work in its North Platte office at a salary of $600 per month. Brown commenced to work on this job on August 3, 1959, and has been so employed ever since. Since taking this employment Brown admits he has made changes in the manner of operating North Platte Loan and Finance Company, which changes, he admits, were based on knowledge he had gained while an employee of Securities Acceptance. He also admits he has called on and talked to former customers of Securities Acceptance but denies having solicited them for any business.

Cases of other jurisdictions dealing with the subject of this litigation are very numerous and, upon what appear to be similar situations, come to varying conclusions and results. This court has also dealt with the subject thereof on several occasions. Insofar as it has done so we see no good reason for now departing from

the principles therein announced except to say that each case must necessarily stand or fall on its own facts.

At common law all contracts in restraint of trade were against public policy and void. Kadis v. Britt, 224 N. C. 154, 29 S. E. 2d 543, 152 A. L. R. 405. However, while not favorites of the law, partial restraints are not deemed to be unenforcible when they are ancillary to a contract of employment and are apparently necessary to afford fair protection to the employer. Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770; Dow v. Gotch, 113 Neb. 60, 201 N. W. 655; Personal Finance Co. v. Hynes, *supra*. The same would be true of a partial restraint of business competition in connection with a sale or purchase thereof. Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842; Swingle & Co. v. Reynolds, 140 Neb. 693, 1 N. W. 2d 307; Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841; Adams v. Adams, *supra*: Gallagher v. Vogel, *supra*. As stated in Adams v. Adams, *supra*: "A contract which imposes partial restraint upon the exercise of a trade, business, or occupation is not unreasonable when it is ancillary to an actual transaction involving property, business, or employment made in good faith and is necessary or appropriate to afford fair protection to the one in whose favor the restriction is made. Such a contract will be respected and enforced." The restrictive provisions here sought to be enforced are ancillary to the contract of employment between Securities Acceptance and Brown.

In Adams v. Adams, *supra*, we said: "* * * the law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used." However, in Gallagher v. Vogel, *supra*, we went on to say: "Contracts (such as here involved) must receive a reasonable construction,

so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed." See, also, Tarry v. Johnston, *supra.*

Brown contends the written contract of employment dated August 28, 1952, is not enforcible because there was no new consideration involved when it was executed. The original oral agreement of employment between the parties was one at will, that is, either party could terminate it at any time. The written agreement provides, in this respect, "* * * that either party may terminate the employment * * * by fifteen days' notice to the other, and if the Employer shall so terminate it, the Employee shall be entitled to pay for said fifteen days, * * *." Thus additional benefits accrued to Brown by the terms of the written agreement which did not contractually exist prior thereto.

But Brown testified he understood, at the time he went into the office of Securities Acceptance at North Platte on March 11, 1952, that it had a policy, whenever it discharged an employee for any cause, of giving such employee 2-weeks' pay. Let us assume, but not decide, that by reason of such policy, if it existed, that the foregoing provision in the written agreement did not provide any additional benefits for Brown. After Brown voluntarily signed the agreement with Securities Acceptance he continued his employment with it for almost 7 years. During this time he was promoted to branch manager of the North Platte office and thereafter, as of June 1, 1959, to the position of supervisor. During the same period of time his salary was, at various times, increased, raising it from $350 up to $675 per month. During the period from April 1, 1955, to June 1, 1959, Brown received bonuses, based on profits, totaling $6,773.39. Then, on July 13, 1959, without good cause, he notified his employer he was quitting as of July 15, 1959, probably to take employment with another company in North Platte engaged in a similar business,

thus clearly breaching his contract of employment. Under similar or comparable situations other courts have enforced the restrictive provisions of an agreement in partial restraint of trade. See, Roessler v. Burwell, 119 Conn. 289, 176 A. 126; Ofsowitz v. Askin Stores (Tex. Civ. App.), 306 S. W. 2d 923; Krueger, Hutchinson & Overton Clinic v. Lewis (Tex. Civ. App.), 266 S. W. 2d 885, affirmed 153 Tex. 363, 269 S. W. 2d 798; McAnally v. Person (Tex. Civ. App.), 57 S. W. 2d 945. Having received the benefits accruing to him from his execution of the contract for almost 7 years, Brown is not now in a position, after his breach thereof, to ask a court of equity to find such agreement void because of want of consideration.

We also think Brown is estopped from doing so by the following principle, as stated in Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N. W. 277: " 'The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. * * * And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.' "

As we have already said, each case must, of necessity, depend upon its own facts and circumstances. In Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826, it was said: "Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression." See, also, Mollyneaux v. Wittenberg, 39 Neb. 547, 58 N. W. 205; Downing v. Lewis, *supra;* Wittenberg v. Mollyneaux, *supra;* Roberts v. Lemont, *supra;* Dow v. Gotch, *supra;* Stanford Motor Co. v. Westman, *supra.* In Swingle & Co. v. Reynolds, *supra,* we held that: "A contract of employment may

constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business."

There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. See, Roberts v. Lemont, *supra;* Dow v. Gotch, *supra;* Personal Finance Co. v. Hynes, *supra;* Annotation 43 A. L. R. 2d, Employee-Restrictive Covenant-Area, § 19, p. 144.

As to the first two of the foregoing we have already decided, in Personal Finance Co. v. Hynes, *supra,* that a restriction on employment is not injurious to the public as it relates to a small loan business; that if properly limited as to time and space, it is no greater than is reasonably necessary to protect an employer engaged in such business; that an employee, within such time, is capable of doing irreparable damage; and that, under such circumstances, the remedy available at law is not adequate, thus giving rise to injunctive relief. But Brown contends our holdings in this regard in Personal Finance Co. v. Hynes, *supra,* are merely dicta since the case was actually disposed of on the basis of waiver. However, a careful consideration of the situation therein involved makes the following applicable to our holdings therein: "The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns." Lancaster County v. McDonald, 73 Neb. 453, 103 N. W. 78. Discussion of what is dictum

may be found in Sedlacek v. Welpton Lumber Co., 111 Neb. 677, 197 N. W. 618. Therein we quoted with approval the following from Union P. R. R. Co. v. Mason City & Ft. D. R. R. Co., 199 U. S. 160, 26 S. Ct. 19, 50 L. Ed. 134: " 'Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no sense, be called mere dictum. * * * It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.' "

Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Roberts v. Lemont, *supra*.

The evidence shows that Brown, as branch manager of the North Platte office of Securities Acceptance for many years, became familiar with its policies, its procedures, its customers, and all the factors involving the operation thereof and, upon assuming his employment with the North Platte Loan and Finance Company, could use such knowledge for the benefit of that company. As stated in 9 A. L. R. in Part III, § b(1), p. 1468, under the Annotation of Restrictive Covenant in Employment Contract: "It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair ad-

vantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." We think the foregoing has application to the situation here presented. See, also, Masden v. Travelers' Ins. Co., 52 F. 2d 75, 79 A. L. R. 469; Matthews v. Barnes, 155 Tenn. 110, 293 S. W. 993, 52 A. L. R. 1350; Briggs v. Butler, 140 Ohio St. 499, 45 N. E. 2d 757.

Brown contends the enforcement would be unduly harsh and oppressive upon him because of his physical condition and economic status. As to the first, the evidence shows that Brown, in connection with his services in the armed forces of his country, suffered a service-connected disability in the form of rheumatoid arthritis as a result of swimming in cold water in connection with his duties in under-water demolition. This condition was first classified by the Veterans Administration as 20 percent disabling but later, as of October 13, 1953, rated as 40 percent disability. Brown advised the officers of Securities Acceptance of his condition but never to the effect that it bothered him in any manner in performing his duties for it. During the time he was at North Platte, especially while branch manager, his duties required him to drive his car over the territory being served from that office. He drove it from 2,500 to 3,000 miles a month. He never complained that doing so bothered him and apparently it didn't. When he was transferred to Omaha and became a supervisor he knew that position involved traveling extensively in a car but he made no complaint of that fact when he accepted the position. In fact, during the short time he was in Omaha he drove to North Platte on either four or

five weekends. He also, at all times, did extensive driving for his and his family's pleasure. We do not think the evidence establishes that driving a car very seriously affected Brown's back. In fact, we think he used that as an excuse for breaching his contract at a time when he had already laid the ground work for employment with North Platte Loan and Finance Company. The latter was the real reason why he quit.

Brown was born on June 27, 1925. He was graduated from the Business Administration College of Kansas State University in 1949 with a B. S. degree, having majored in economics and mathematics. After graduation he sold life insurance for a short while but, as of December 1, 1949, took employment with Commercial Credit Corporation at Salina, Kansas. He was married on December 30, 1950. When, as of February 22, 1952, Brown made application for employment with Securities Acceptance, his financial situation seemed to be reasonably good for a man of his age. The extent of his income while working for Securities Acceptance has already been set forth. It shows he has ability in the field which he has chosen for his life's work. Employment in this field is available in any city of any size. Brown has been and is now apparently being paid disability benefit payments on the basis of his service-connected disability in his rank of lieutenant (j.g.) which he had at the time of his honorable discharge from the Navy. When Brown resigned he took a cut in salary. He then told the officers of Securities Acceptance that doing so was not of too much concern in view of both his and his wife's families' financial condition. In fact he told them that by going with North Platte Loan and Finance Company he had a chance to invest up to $35,000 therein. Considering all of these factors we do not think the restriction imposed, as such, was unduly harsh and oppressive. As we said in Dow v. Gotch, *supra:* "Times have changed since the day when an English court, upon being advised that a contract of

this nature had been entered into, declared that if he had the employer present he would impose a fine upon him to be paid to the king. In that early day men did not go from place to place as they do now. The habit of covering a wide territory had not become prevalent. A journeyman stayed where he had been raised and where he had learned his trade. A removal to a place 50 miles or more away was a great undertaking. People did not go away from home, they stayed where they were put. The situation is different here and today. A removal to another state is easy and comparatively inexpensive. Men and women of all employments go from one end of the country to another, and quickly find new places, and more advantageous places, in which to practice their vocations. With the development of railroad service and the automobile (and we might add air travel), people do not remain rooted to their native soil. Without danger to themselves and without detriment to the public, men and women may, and do, contract not to engage in particular work in a particular place. Modern living has extended the range of the individual." In this respect we have not overlooked Brown's service-connected disability but that does not appear to seriously affect his ability to work at his chosen vocation, plus the fact that he receives disability benefit payments by reason thereof. Nor have we overlooked the fact that Brown now has a family. That is only normal for a man of his age. His life's work is of such a nature that it can be carried on in almost any city and is not peculiarly adapted only to North Platte, except as he has an advantage in working there because of the knowledge he has gained and friends he has made while working for Securities Acceptance. We think what was said in Household Finance Co. v. Sutton, 130 W. Va. 277, 43 S. E. 2d 144, has application here: "As to a possible hardship upon the employee, it is to be remembered that in this instance the employee voluntarily terminated his own

employment or resigned. There is no imputation of bad faith on the part of the employer in that respect. If there were our holding on that phase of the matter could well be different. But in the case at bar we see no hardship brought upon the defendant Sutton unless it is that which resulted from his own lack of bona fides."

In connection with the question of whether or not the restriction is reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate interest and reasonable in the sense that it was not unduly harsh and oppressive on the employee the question of time and space is involved. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void. See Roberts v. Lemont, *supra*. As stated therein: "A contract in restraint of trade which is not limited either in time or space is against public policy and void." Where the conditions therein appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced, although they are limited as to either time or space. See, Roberts v. Lemont, *supra;* Farmers State Bank v. Petersburg State Bank, 108 Neb. 54, 187 N. W. 117; Dow v. Gotch, *supra*. However, the general rule is that a contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space. See, Mollyneaux v. Wittenberg, *supra;* Downing v. Lewis, 59 Neb. 38, 80 N. W. 261; Roberts v. Lemont, *supra;* Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688; Buerstatte v. Swanson, 112 Neb. 30, 198 N. W. 174; Dow v. Gotch, *supra;* Swingle & Co. v. Reynolds, *supra*. As stated in Roberts v. Lemont, *supra:* "The general rule is that a contract in partial restraint of trade should be reasonable in its terms and limited in its extent, both as to time and space, * * *." We think the latter is applicable here.

With respect to the contract provision as to space

it provides the restriction shall apply "in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer." The provision definitely limits the area to cities in which an employee has been located or employed or to the environs or trade territory thereof. That Brown fully understood that "trade territory," as contained in the contract, applied to the geographical area assigned to a branch office by Securities Acceptance is fully established by the record. That fact was fully evidenced when the "trade territory" serviced out of North Platte was decreased when a branch office was established at McCook. Brown is not now in a position to dispute that fact. We have held that such a limitation of area is an enforcible provision. Personal Finance Co. v. Hynes, *supra.*

There is a further factor involved in the area limitation provision. It is disjunctive in form. It permits restraint in any city in which the employee has been located or employed by his employer; to any such city and its environs; or to any such city, its environs and trade territory. The latter within the area as the use of "trade territory" in the agreement was understood by the parties. See, Whiting Milk Companies v. O'Connell, 277 Mass. 570, 179 N. E. 169; McAnally v. Person, *supra;* Household Finance Corp. v. Sutton, *supra.* As stated in Whiting Milk Companies v. O'Connell, *supra:* "A contract in restraint of trade in which the territory is unreasonably extensive may be divisible as to space and enforced in equity within a reasonable area."

We come then to the question of the limitation as to time. It is for a period of 18 months after the termination of Brown's employment with Securities Acceptance for any reason in any city in which he may have been located or employed and not 18 months from the last date he was located or employed in such city by the employer. And such is the manner in which Securities Acceptance construed it for it sought to enjoin

Brown for 18 months from July 15, 1959, the date he severed his employment with it, and not from May 31, 1959, the latter being the last day he was located at and employed in the office at North Platte. In other words, if Brown had been last located or employed in the office at North Platte some 20 years prior to leaving his employment with Securities Acceptance, the provision would still be effective to restrain him from seeking employment in North Platte in the field in which Securities Acceptance is engaged for 18 months thereafter. We do not think such provision is necessary to protect Securities Acceptance insofar as it is operating a loan business in North Platte, or any other city. We find it is unduly harsh and oppressive on Brown or any other of its employees coming within the provisions of similar agreements.

Having come to the conclusion that paragraph VIII of the parties' agreement is unreasonable insofar as it provides an unreasonable length of time during which an employee may be prevented from taking up his vocation in any city where he has been located or employed while in the employment of Securities Acceptance, we turn to the other restrictive provisions hereinbefore set forth.

Paragraphs V and VI thereof, insofar as they relate to Brown while he was in the service of Securities Acceptance, are reasonable and proper but with that viewpoint we are not here involved. Paragraph VII provides that they shall remain in full force and effect for 3 years after the termination of the employment, together with the restrictions contained in paragraph VII itself. We think paragraph VII is unenforcible because there is no limitation on area. Certainly it is not necessary, in order to reasonably protect Securities Acceptance's legitimate interests, to prevent a former employee covered thereby from doing all the things therein prohibited in all cities of the United States, and their trade territories, in which Securities Acceptance

has not been or is not now operating. But assuming such provisions are enforcible, we think there is a good reason why they should not be enforced in this action in view of the record before us. Within the intent and meaning of the contract, we do not think paragraphs V, VI, and VII applied to Brown after he obtained employment with North Platte Loan and Finance Company on August 3, 1959, for paragraph VIII relates to the limitations placed on such employee after he obtains, either directly or indirectly, reemployment in the same field. However, insofar as the restrictions contained in paragraphs V, VI, and VII, relate to paragraph VIII, they are controlled by our holding in regard thereto.

We have come to the conclusion that Securities Acceptance is not entitled to the injunctive relief herein sought and for that reason we affirm the action taken by the trial court.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF OAKDALE TELEPHONE COMPANY, OAKDALE, NEBRASKA, A CORPORATION.
OAKDALE TELEPHONE COMPANY, APPELLANT, V. HENRY WILGOCKI ET AL., APPELLEES.
106 N. W. 2d 486

Filed December 9, 1960. No. 34844.

1. **Public Service Commissions.** The Nebraska State Railway Commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done.
2. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
3. **Public Utilities: Telecommunications.** A public utility is en-

titled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience.

APPEAL from the Nebraska State Railway Commission. *Reversed and remanded.*

O'Hanlon & O'Hanlon, for appellant.

Charles W. Raymond, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an appeal from the Nebraska State Railway Commission. It will hereinafter be called the commission. It involves an application for an increase of rates by the Oakdale Telephone Company of Oakdale, Nebraska. It will hereinafter be called the company. One of the appellees is Henry Wilgocki, one of two witnesses who testified for appellees at the hearing hereinafter referred to. They will where necessary be referred to as protestants or by name.

The commission denied the application. The company appeals. We reverse the order and remand the cause.

The company operates a magneto type service to some 287 customers in Oakdale and the area adjacent thereto. It has 15 rural lines. It received its last rate increase in March 1948. It keeps its books and records under the system prescribed by the commission for class "C" companies. It employs two operators of its switchboard. One received $65 per month with $5 deducted for house rent. The other received $60 per month. It asks for rates sufficient to increase the rate of pay of these operators to $105 and $100 per month, respectively. It has not had revenue sufficient to employ a lineman since the spring of 1959. The maintenance of its system has deteriorated since that time. It employs the services of a lineman of a neighboring

company when emergency service is required. It asks for rates sufficient to pay $250 per month for plant maintenance personnel.

It has had no regular bookkeeper since August 1959. It employs accounting service at the rate of $115 per month. It asks for a rate increase sufficient to pay an increased cost of $865 per year for that service.

The company claims a total investment as a rate base of $23,730.43. On that base it had a net earning of $41.09 for the year 1959. It asks for rates that would increase its earnings to $1,154.38 or a return of 4.94 percent on substantially the above rate base.

One of the witnesses was Joe Knievel, who testified that he was a director of a telephone company with offices in South Sioux City, which had been interested in acquiring the company—applicant here. He testified that the South Sioux City company "came up" with a value of approximately $15,000 for the Oakdale plant and franchise.

The applicant admits that the services it now renders are not of a commercial quality but offered testimony that if given the proposed rate increase it could restore its plant and give that quality of service.

The above facts are taken from the application of the company and the evidence at the hearing. They are recited as preliminary to the matters which we discuss.

It appears that controversy has arisen between stockholders about the election of officers and directors and that it has become a matter of litigation in the district court for Antelope County. At the opening of the hearing, later discussed herein, the attorney for the protestants moved for a continuance until that litigation was determined. He offered, but did not identify, the petition in the district court proceeding. The commissioner conducting the hearing said that the commission had decided it would take testimony concerning rates and charges only. The attorney for the protestants asked to preserve his objection and that the commission

consider it when it arrived at a decision. Nevertheless the protestants, as a part of their showing, later made formal offer of a certified copy of the petition and it was received over objection, although not "very pertinent."

The application in this case was filed February 1, 1960. Hearing thereon was set for March 10, 1960, at Neligh, Nebraska, and later continued to and had on April 6, 1960.

Rule 4.7 of the Rules of Practice and Procedure before the Nebraska State Railway Commission provides that: "The Commission may in its discretion assign any case before it to an Examiner for initial hearing. All Examiner's reports and recommendations shall be served upon the interested parties of record. Within ten days after the date of the mailing of the Examiner's report and recommendation, any party may file and serve exceptions thereto and reasons in support thereof. Exceptions to the Examiner's report with respect to statements of fact and matters of law must be specifically stated and numbered separately. If exceptions are taken to conclusions in the report, the points relied upon to support the exceptions must be stated and numbered separately. If no exceptions are filed within ten days after the mailing of the Examiner's report and recommendation, the Commission will consider same and render its decision."

Rule 6.1 of the Rules of Practice and Procedure before the Nebraska State Railway Commission provides that: "Ordinarily no oral argument will be permitted at the close of the hearing. However, the Commission or Examiner may request or permit such argument. The Commission will hear oral argument in all cases on exceptions to the Examiner's report and recommendation, and on motion for rehearing, where there is a prior request therefor in writing. Unless otherwise ordered by the Commission, oral argument will be limited to thirty minutes on each side."

The "initial hearing" here was conducted by one of the commissioners. Obviously he was acting in the capacity of and with the duties and responsibilities of an examiner. He made no report or recommendation to the commission and of necessity none was or could be served on "interested parties of record." There was accordingly no opportunity given to serve exceptions thereto and reasons in support thereof.

The hearing before the commissioner was concluded on April 6, 1960. One week later on April 13, 1960, it filed what is recited to be its "Opinion and Findings." It consists of one sentence: "The Commission, having considered the application, filings *and the evidence in the matter,* is of the opinion and finds that the application should be denied." (Emphasis supplied.) It ordered the application "denied."

The commission by the expedient of having a commissioner hear this cause sought to avoid compliance with the intent and purpose of rule 4.7 hereinbefore mentioned. There was no report and recommendation of the one commissioner for the commission to consider and upon which to "render its decision," save and unless the report and recommendation was made in secret. This conclusion is made clearly apparent when it is considered that the notice of appeal was filed herein on April 27, 1960. The bill of exceptions was prepared on May 2, 1960, and together with exhibits was filed with the commission on May 3, 1960. This was 3 weeks after the commission entered its formal recital on April 13, 1960, that it had "considered * * * the evidence in the matter" before denying the application.

There are in rule 5 on evidence several rules applicable to a commissioner or examiner holding hearings. One of them is: "When objection is made to the admissibility of evidence, the presiding Commissioner or Examiner may receive such evidence subject to later ruling by the Commission." Rules of Practice and Procedure before the Nebraska State Railway Commis-

sion, Rule 5.1. What was the ruling of the commission on the admissibility of the copy of the petition of the pending Antelope County action? This record reveals nothing in answer to that question nor to the question to what extent, if any, that pending action was the basis for the decision herein. The procedure followed by the commission here prevented the applicant from raising that question.

Rule 6.1 hereinbefore mentioned provides that the commission will hear oral argument in all cases on exceptions to the examiner's report and recommendations. By the expedient of having neither report nor recommendation in compliance with its rules, oral argument by the applicant was denied.

This record is replete with repeated avoidances of the commission's own rules and those rules which are in American justice designed to assure an applicant a fair hearing before the commission. Due process was denied the company. The applicant and this court are left facing the question unanswerable from the record: Why was the application denied?

The company on the evidence produced is denied a fair return on its invested capital, even on the value fixed by the protestants; it is denied the revenue to secure necessary employees to maintain and operate its plant; it is denied the opportunity to pay employees an adequate, reasonable wage; and it is denied the revenue necessary to put its plant in a condition to render reasonable service. The company's patrons are denied the service that public convenience and necessity entitles them to in this age. Parenthetically, it may be pointed out that of the almost 300 patrons of the company, only two witnesses appeared against the allowance of the application. One of those was admittedly interested in securing the ownership of the company for the South Sioux City company. The other seemed to take the position that the company should first rehabilitate its lines and modernize its plant at the ex-

penditure of considerable funds. To that the company replies that its present revenues are such that the securing of outside capital is a practical impossibility and that by the provisions of its articles of incorporation its power to borrow is limited to "30 percent of the paid-up capital stock" of the corporation, and that the above provision "cannot be amended."

We had a somewhat comparable situation in Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715. There we said: "A mere recital of this record is sufficient to show that the commission's acts, violating its own rules made for its own proceedings and violating those rules made by it for the protection of the rights of an applicant, were unreasonable and arbitrary. The applicant, for all this record shows, was accorded no hearing before the commission. The commission listened to no argument (section 75-402, R. R. S. 1943); it made no finding of facts; it gave the applicant no reason for its action; and it provided no basis for a review of findings of fact. * * * the effect of the order is to find that there was no need for more revenue so that the applicant could meet the needs of its property for maintenance, betterments, and extension of service. Also that there was no need for more revenue to meet the applicant's fixed charges such as taxes and interest. Also that there was no need for more revenue to meet the payment of an adequate fair return to its stockholders. As to these three areas of need, the evidence was unchallenged. The commission denied any relief to the applicant without an examiner's report, without a hearing by the commission, and apparently without access to the transcript of the evidence. * * * The duty of determining what conclusion should be made as to those matters rests upon the commission. The commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done. * * * The commission should consider each

of the several items and make findings of fact thereon. In that way if the applicant is dissatisfied, we, on appeal, may consider the matter in the light of the rule that: On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

"The evidence here does not meet that test.

"There is evidence here which, without dispute, demonstrates that the commission's finding denying any rate increase applicable thereto was unreasonable and arbitrary.

"A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience. Marquis v. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927; Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 103 Neb. 695, 173 N. W. 690."

(Here there is a question about the base value of the company's property, but a substantial value is conceded by protestants.)

"There is no question about the return that the rates required by the commission may normally be expected to yield. There is no question about the amount that the applicant may be able to pay to its investors. There can be no question that it is not a fair return on invested capital.

"The order of the commission is clearly wrong. It is reversed and the cause remanded."

We repeat and again hold what we said and held in Skeedee Independent Tel. Co. v. Farm Bureau, *supra*.

REVERSED AND REMANDED.

JOHN L. MORTON ET AL., APPELLEES AND CROSS-APPELLANTS, V. TRAVELERS INDEMNITY COMPANY, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

106 N. W. 2d 710

Filed December 16, 1960. No. 34820.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.
3. **Negligence: Trial.** A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable, and failure to define proximate cause as such by instructions of the court could not have reasonably entered into and affected the result.
4. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
5. ———: ———. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defect.
6. **Insurance.** The parties to an insurance contract may make the contract in any legal form they desire, and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.
7. ———. An insurance policy should be construed in the same

manner as any other contract in order to give effect to the intent of the parties at the time it was made.

8. ———. The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.

9. ———. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

10. ———. The clause, "collapse of the building or any part thereof," appearing in an insurance policy such as that at bar, means a sudden or unusual shrinking, settling, or falling of the building or any part thereof, or a loss of firm support, rigidity, or connection with other parts, but the wall or walls or other parts of the building need not have actually fallen down or together into an irregular mass or flattened form within the abstract text definitions of the term "collapse," unless the policy so prescribes.

11. **Insurance: Attorney and Client.** The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority, and statutes so providing, such as section 44-381, R. R. S. 1943, must be strictly construed and applied.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Cline, Williams, Wright & Johnson and *Charles E. Wright*, for appellants.

Crosby, Pansing, Guenzel & Binning and *Donn E. Davis*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, John L. Morton and Mary Ellen Morton, who jointly owned a dwelling house property at 2702 Bradfield Drive in Lincoln, brought this action against defendant, Travelers Indemnity Company and others, seeking to recover under the provisions of a "Comprehensive Dwelling Policy" of insurance covering the

dwelling, which policy defendant company had duly executed and delivered to plaintiffs on or about January 1, 1957, upon payment of $88.80 as the first annual premium. Among other things, such policy insured plaintiffs to the extent of but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after loss against all direct loss by fire, lightning, windstorm, and hail perils and other multiple enumerated scheduled risks.

Among other things, the policy agreed to pay for direct loss by: "9. Collapse: Loss by collapse shall mean only the collapse of the building or any part thereof." Also, under the terms of the policy, the homeowner had a contractual duty to make reasonable repairs confined solely to protection of the property from further damage, and keep an accurate record of such repair expenditures. It further provided that costs of any such repairs directly attributable to any peril insured against should be included in determining the amount of loss.

In that connection, plaintiffs attached a copy of the policy to their petition, and, relying upon its provisions aforesaid, sought to recover from defendant the cost of repairing the basement walls and other damages to their dwelling as direct loss when sometime between about March 23, 1957, and March 28, 1957, a part of their dwelling's concrete basement walls allegedly collapsed and damaged other parts of the house, and imposed serious and immediate danger that the dwelling would further collapse. Original defendants other than Travelers Indemnity Company were dismissed out of the action and are not here involved.

Defendant's answer admitted that plaintiffs were joint owners of the property, and that defendant issued the policy of insurance thereon for a risk entitled therein "collapse," as alleged. Defendant then specifically denied that plaintiffs suffered any "collapse" loss as de-

scribed in the policy, and denied generally except as expressly admitted. It was stipulated that plaintiffs' reply in the nature of a general denial should be considered as filed.

Upon trial to a jury, plaintiffs adduced evidence in their behalf and rested. Thereupon, defendant moved for a dismissal of plaintiffs' petition and cause of action, or in the alternative to direct a verdict in favor of defendant substantially upon the grounds that plaintiffs' evidence was insufficient to support and establish any cause of action under the "collapse" provisions of the policy. Such motion was overruled and defendant rested without adducing any evidence in its behalf.

Upon submission to the jury, it returned a verdict in favor of plaintiffs and against defendant for $1,500, and judgment was rendered accordingly. Thereafter, plaintiffs' motion for an allowance of attorneys' fees, under the provisions of section 44-381, R. R. S. 1943, and defendant's motion for judgment notwithstanding the verdict or in the alternative for new trial, were overruled. Thereupon, defendant appealed, assigning and arguing that the trial court erred as follows: (1) In overruling defendant's motion to dismiss and failing to render judgment for defendant pursuant to its motions; (2) in the giving of instruction No. 5; (3) in failing to instruct on proximate cause; (4) in admitting exhibits Nos. 2 to 13, inclusive; and (5) in failing to hold that the verdict and judgment were excessive and not supported by the evidence. We do not sustain the assignments.

On the other hand, plaintiffs cross-appealed, assigning and arguing that the trial court erred in overruling their motion for an allowance of attorneys' fees. We do not sustain their assignment.

As recently as Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, we reaffirmed that: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision

thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

Also, in Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, we reaffirmed that: "Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court."

As summarized, plaintiffs' evidence discloses substantially the following: Plaintiffs purchased the property known as 2702 Bradfield Drive shortly prior to January 1, 1957, when they purchased the policy here involved from defendant and paid the $88.80 premium therefor. The policy's multiple provisions appear in the original policy which was offered and received in evidence. Plaintiffs moved into the house on February 1, 1957, with their two sons who were respectively 5 and 3 years old. The boys played almost daily in the basement, and Mrs. Morton was in the basement working and looking after them several times a day. The house was about 30 years old when purchased but it was in good condition. It had recently been redecorated and there were no visible warps or cracks in the walls on the first and second floors; or a drop in one end of the house; or cracks; or bowing, bulging, or caving in of the north, south, and west walls of the basement when plaintiffs purchased the house or when they left Lincoln for a trip to Chicago on March 23, 1957. In that connection, Mrs. Morton had been working in the basement until 2 a. m. on Saturday morning, March 23, 1957, in order to prepare for that trip, but the house was then

intact. Thus, about 8 or 9 a.m. on March 23, 1957, plaintiffs both left for the trip and returned therefrom on the evening of Thursday, March 28, 1957. While absent from Lincoln, there had been a heavy snow which was rapidly melting upon their return.

When they returned that evening, Mr. Morton went down into the basement to see whether the rapidly melting snow had leaked into the basement. It had not done so. However, he observed that the north wall had a slight water stain on it and that the wall was bulging and caving in his direction, as was also the west wall. The same condition existed on the south wall, only more so. That wall was coming into or buckling into the center interior of the basement. That wall was cracked from almost the upper righthand corner to almost the lower lefthand corner, and some of the concrete blocks had broken. That wall bulged inward about 4 to 6 inches and had the appearance of immediately falling into the basement. The southwest portion of the south wall was no longer intact with the house, and there was a hole in between the blocks where they had broken open and the mortar had come out onto the basement floor, which it continued to do thereafter. The floor in the southwest corner of the basement was cracked and raised up some. The basement walls remained standing with the bulges and cracks in them, but they were not intact. Mr. Morton testified that he did not see any of the wall blocks lying out on the basement floor as a result of what you would call a collapse, but it looked like it could happen any minute. He did not know what the term "collapse" meant as used in the policy, but his opinion was that "collapse" was where something falls completely down, and in this situation it hadn't fallen completely down, but from the way it bulged and leaned it looked like total collapse could happen any time. The east wall was straight and looked like it had been repaired on some previous occasion.

Mrs. Morton made comparable observations, except that by measuring from an electric pipe on the south wall she thought it was bowed in from 9 to 10 inches.

A graduate consulting engineer, who specialized in soil, asphalt, and concrete problems, casually inspected the basement of plaintiffs' home on or about April 1, 1957, at the request of an agent for defendant. He testified that the north, west, and south walls all had a degree of inward bow or buckling, with the south wall being more pronounced and critical. He estimated that the convex bulging was 2 or 3 inches from a perpendicular line distributed fairly well over the entire south wall, and that same was buckling rather critically. Such wall was cracked and opened up between some blocks where they had been previously filled and painted, and that the east wall appeared to be relatively new. He advised that the walls needed to be replaced or repaired by being braced or otherwise supported, because they could completely collapse in the foreseeable future. He testified that the north and south walls would be carrying the predominant load of the house, and if they fell in, the house would follow them down and the floor base would collapse in the areas adjacent to the walls, and generally that the house and wall would go down or topple into the basement, but that no part of the house had yet collapsed into the basement. He testified that the condition so found was caused by previous relatively heavy precipitation and exterior pressure therefrom. He only inspected the basement walls.

Another witness, who examined and fully inspected the basement walls in April 1957, had been a contractor in Lincoln for 15 years, specializing in concrete masonry excavation work, and replacement of basement walls and foundations. He found considerable bulging and a vertical crack in the south and north walls, with less in the west wall. His opinion was that such basement walls had in fact a loss of firm connecting rigidity or support; that they had lost any holding power; that

after becoming overbalanced, they had lost their balance; that some of the blocks themselves were cracked in two, as distinguished from cracks in between the joints; and that the cracked blocks had very little holding power against outer pressure. He testified that evidently the east wall had been previously relaid with the same type of material. His opinion was that the condition of the north, west, and south walls was such that they could not have been repaired and made good or permanent without removal and reconstruction. He actually supervised their removal and replacement with newly constructed footings and walls. In doing so, timbers were placed up against the floor joists of the house and supported by jacks along the walls to hold the joists into position, then the walls were torn out and new 10-inch walls were laid back on the footings up under the house in such manner as to firm its support on the walls. The undisputed evidence is that he was paid $1,250 by the plaintiffs for such work, and that such amount was a fair and reasonable charge for the work and materials. In that connection, defendant argues that if plaintiffs are entitled to recover, the verdict and judgment should be reduced to $1,250 because, for want of sufficient evidence, plaintiffs could recover nothing for claimed damages and costs for repairing other parts of the house allegedly resulting from the damaged condition of the basement walls.

With respect to the upstairs portion of the house, plaintiffs testified that the house had been recently decorated and that prior to their trip to Chicago there were no visible cracks in or damage to the upstairs walls. However, upon their return from Chicago, they found cracks in the walls and corners that warped the paper, and other wall damage, to wit: In the south bedroom; over the window sills in the living room; in the bathroom; in the back hall and entryway; and in the den, hall, and stairway. The mantle on the south side of the fireplace could be seen to be warped and slanted

down toward the south, out of level; and the back entry door and walls were warped and pushed so clearly out of line that they had to change the lock on the door in order to keep it shut. In that connection, the consulting engineer who had inspected the basement walls at defendant's request, testified that the house walls would go downward if the north or south wall moved down as much as one inch. Photographs appearing in this record as exhibits Nos. 2 to 13, inclusive, graphically reflect the aforesaid condition of the upstairs on March 28, 1957, and November 10, 1959, and, contrary to defendant's contention, they were properly admitted in evidence, which disposes of defendant's fourth assignment of error.

Contrary to defendant's contention, the evidence was sufficient to support a contention that the upstair damages aforesaid directly resulted from the sudden and unusual condition and damages to the basement walls. No other inference could reasonably be drawn from the evidence.

In that connection, the parties stipulated, subject to objection by defendant, that if a named painter and paperhanger were called as a witness, he would testify that he had examined plaintiffs' house on or about April 8, 1957, and again on November 10, 1959, at which times it was in about the same condition, and that in his opinion the fair and reasonable value of repairing the cracks and repapering the upstairs would be respectively as follows: The living room, $150.50; the hall and stairway, $230.50; the lower bathroom, $27.50; the southwest bedroom, $29.50; the back hall, $75.00; and the den, $70.55. The total thereof was $583.55. Defendant's objection to such evidence, as incompetent, irrelevant, immaterial, and not tending to prove or disprove any issue in this case, was overruled, and from what has been heretofore and will be hereinafter pointed out, we believe that ruling was proper. It will be noted that the verdict of the jury was for only $1,500, and $1,250 thereof

was undisputed, so evidently the jury awarded plaintiffs only $250 for the upstairs repairs, and plaintiffs make no complaint thereof.

In the light of the foregoing, the first and primary question is the construction and application of the provision of the policy providing for direct loss insured against by "the collapse of the building or any part thereof." In substance, defendant argues from several text definitions of the term "collapse" that "the collapse of the building or any part thereof" means to fall together, as a building, through the falling of its sides; to fall into an irregular mass or a flattened form through loss of rigidity or support; to fall or cave in; to break down or fall; or to come to nothing. In that connection, defendant contends that the word "collapse" as so defined is unambiguous; that its meaning is fixed and understood by all, therefore plaintiffs' basement walls did not collapse; that the upstairs was not directly damaged by collapse of such walls within the terms of the policy; and that plaintiffs could not recover thereon because to permit it would create a new contract between the parties.

On the other hand, plaintiffs contend that this court is not faced with the problem of defining only the word "collapse" as argued by defendant, but rather with what the parties to the insurance contract meant by the clause "collapse of the building or any part thereof"; that is, what a reasonable person in the position of insured would have understood such clause to mean. Plaintiffs argued that a reasonable insurance purchaser would understand the coverage for direct loss by "collapse of the building or any part thereof" to mean a sudden or unusual shrinking, settling, or falling in of the building or any part thereof, or the loss of firm support, rigidity, or connection with other parts, but that the basement walls would not need to have actually fallen down, as stated by instruction No. 5 given by the trial court when considered in connection with

all other instructions given and the factual situation presented. Defendant made no request for a more specific instruction.

In that connection, it is generally the rule that: "Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects." Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

Also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551, held that: "Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misleading or confusing."

As hereinafter observed, we agree with plaintiffs' contention; therefore the trial court did not err in giving instruction No. 5, or in failing to define proximate cause. With respect to proximate cause or direct loss, numerous instructions given by the trial court relating to plaintiffs' loss required that it be a "direct loss," or "direct result," or "directly attributable," or a "directly causing," or "causing" loss by collapse of the building or any part thereof, as provided in the policy. Such quoted words are plain and clear language, generally well understood. Also, a definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is clearly obvious and unmis-

takable, and failure to define proximate cause as such, by instructions of the court, could not have reasonably entered into and affected the result. See, Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913; Kielley v. McCauley, 139 Neb. 60, 296 N. W. 437; Hildebrand v. McCauley, 139 Neb. 55, 296 N. W. 434.

In Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245, we reaffirmed that: "An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made.

"The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.

"If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

"In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract.

"The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed." See, also, Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

We have not heretofore construed and applied the language "collapse of the building or any part thereof." However, a few other courts have done so, with varying results in some respects, since the clause apparently first appeared in 1954. In that connection, defendant

cited and relied on Central Mutual Ins. Co. v. Royal, 269 Ala. 372, 113 So. 2d 680, which involved the provision "collapse of the house or a part thereof." The effect of that opinion was to hold that such language seemed to be a clear and unambiguous statement; that there could be no doubt about the meaning of the word "collapse"; and in so doing, cited Nugent v. General Ins. Co. of America, 253 F. 2d 800, another case relied upon by defendant herein, which involved what the Missouri court would probably hold, but the opinion failed to disclose what rules of construction it used in arriving at its conclusion that the word "collapse" in such a clause should be given its strict text definition.

Be that as it may, Central Mutual Ins. Co. v. Royal, *supra*, is factually distinguishable from the case at bar in all material respects. In that opinion, the court said: "In the case at bar there was no collapse of the building. There was no collapse of any part of the building. Some of the walls appeared to have cracks in them and in two or more places the concrete footing contained cracks, but there was no collapse of the building within the foregoing authorities. There was no falling in, no loss of shape, no reduction to flattened form or rubble of the building or any part thereof. The building was still in its original form and condition with the exception of a few cracks. Accordingly, we do not consider that the appellant was liable under the provisions of the policy to which we have referred or that the plaintiffs were entitled to recover." Also, a comparable situation appeared in Nugent v. General Ins. Co. of America, *supra*.

Defendant also relies upon Weiss v. Home Ins. Co., 9 App. Div. 2d 598, 189 N. Y. S. 2d 355, which involved the policy provision: "Collapse of building(s) or any part thereof including collapse caused by weight of ice, snow or sleet." Plaintiffs therein sought to recover damages for the alleged collapse of a lake dock. There was no proof as to whether or in what manner the dam-

age occurred or whether it occurred at the same time or gradually. The principal questions presented were whether such dock was a building within the meaning of the policy clause, and if so, whether the damage to it constituted "collapse." In that opinion the court said: "We agree with the trial court that 'To constitute the dock as a building under these circumstances however would require a strained construction which would not appear to be warranted by the facts.' But the decision need not depend upon that determination. The record is entirely barren of any proof that the damage to the dock constituted a 'collapse' within any accepted meaning of that word. Certainly the word involves an element of suddenness, a falling in, and total or near total destruction. Neither the oral testimony nor the photographic exhibits demonstrate any such thing. From the evidence it could as readily be determined that the damage to a portion of the dock was due to age or slow deterioration. Hence the plaintiffs have failed to sustain their burden of proof in establishing that their damage was caused by one of the perils insured against." Thus, that case is clearly distinguishable from the case at bar.

Plaintiffs herein rely upon recent cases almost directly in point. Travelers Fire Ins. Co. v. Whaley, 272 F. 2d 288, decided November 12, 1959, involved the clause "Collapse of building(s) or any part thereof." Decision therein turned upon whether there was a collapse of the basement foundation walls of the building under facts comparable in all material respects with those at bar. As in the case at bar, there was no claim that the building or any part thereof collapsed in the sense that it tumbled down or fell in a heap, and the insurance company, relying upon text definitions of "collapse," contended that the record did not support a finding that there was a collapse of part of the building within the meaning of the clause involved. The court's opinion, after citing and quoting from Grady v. Erhard, 143 Kan. 170, 53 P. 2d 478, said: "The court in that case

construed the word 'collapse' as it concluded the parties intended it should be used in the contract. So here, we must construe the word in the context it was used by the parties in executing this insurance contract. Did the parties intend there should be no coverage, and, therefore, no recoverable loss, unless there was a complete collapse and tumbling down of the foundation wall, so as to cause the superstructure to come crashing down in a heap of rubble; or did they mean the more realistic situation that if the foundation distintegrated by settling, pulling away or cracking so that it would no longer support the house, that there was a partial collapse? * * * If the appellant intended that the word 'collapse' should be ascribed the abstract dictionary definition it now contends for, it should have so stated. In the absence of such an expressed intent, we think it more realistic to define the terms in such a contract as connoting a sinking, bulging, cracking, pulling away of the wall so as to impair its function of supporting the superstructure and destroying its efficiency as a habitation."

Also, Jenkins v. United States Fire Ins. Co., 185 Kan. 665, 347 P. 2d 417, relied upon by plaintiffs, was decided December 12, 1959, and involved the clause "collapse of building(s) or any part thereof." Decision therein depended upon whether there was a collapse of the basement foundation walls of the building under facts comparable in all material respects with those at bar. As in the case at bar, there was no claim that the building or any part thereof collapsed in the sense that the basement walls had fallen, and the insurance company contended that there was no coverage under the collapse clause of the policy until the basement walls fell into a flattened, wrecked, or distorted shape. Referring to the evidence, the opinion said: "With respect thereto it suffices to say that although no one contends the basement walls had fallen, there was evidence of a crack running lengthwise almost all the way around the basement walls and, with reference to the north wall, that

such wall had settled, cracked and bulged to the extent its condition created an unsafe and dangerous situation with a possibility of its caving or falling in." The court then rejected the company's contention and, after pointing out that portion of the clause "or any part thereof," said: "When construed on the basis of intention, as required by the foregoing decision, and others therein cited, we believe the clause 'collapse of building or any part thereof' as used in the involved insurance contract is to be interpreted as comprehending that, if brought about by unusual and extraordinary circumstances which the parties to that agreement could not normally expect or foresee on the date of its execution, the settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building is to be regarded as a 'collapse' of the building within the meaning of that word as used in such clause of the policy. We further believe that questions relating to whether that condition came about under the previously related conditions and circumstances are questions of fact for the jury and the trial court." In that connection, such definition is in substance the language of instruction No. 5 given by the trial court in the case at bar, when considered in connection with all other instructions given.

Further, Bradish v. British American Assurance Co., 9 Wis. 2d 601, 101 N. W. 2d 814, relied upon by plaintiffs, was decided March 8, 1960, and involved the clause "Collapse of building(s) or any part thereof." Plaintiff therein contended that there was a collapse of a part of the building, to wit, the basement walls, under facts comparable in all material respects with those at bar, and defendant contended that there was no collapse whatever under the text definition of "collapse." In that connection, defendant contended that "collapse" meant: " 'To fall together or into an irregular mass or flattened form, through the loss of firm connection or

rigidity and support of the parts, or loss of the contents, as a building through the falling in of its sides, * * *.'" In such respect, the court then said: "Appellant submits that coverage against a collapse is limited to such an occurrence. Of course, such a falling would be a collapse. It is undisputed that this wall did not fall into an irregular mass or flattened form. The question is whether something short of a wall reduced to a heap of rubble will satisfy the term 'collapse' as used in the policy."

Thereafter, the opinion cited and quoted with approval from Travelers Fire Ins. Co. v. Whaley, *supra*, and Jenkins v. United States Fire Ins. Co., *supra*, as we have done, and said: "These facts demonstrated that before remedial measures were taken the basement south wall had bulged and cracked in such a manner as to impair materially the wall's basic structure and substantial integrity. We conclude, therefore, that a collapse occurred to a part of the insured building and the defendant is liable upon its policy for the loss attendant upon 'collapse.'"

In the light of such authorities relied upon by plaintiffs, it cannot be reasonably assumed that a person purchasing insurance for his home, including coverage for direct loss by "collapse of the building or any part thereof" understood such phrase as providing coverage if and only if his home, or at least a part thereof, falls together in an irregular mass or flattened form. Otherwise, the homeowner would be purchasing little if any added protection.

In deciding this case as one of first impression in this jurisdiction, we conclude that the authorities relied upon by plaintiffs, as heretofore mentioned and discussed, are sound and well-reasoned cases. We follow the reasoning and conclusions appearing therein, and decide that the verdict and judgment are supported by the evidence and are not excessive; and that the trial court did not err in overruling defendant's motion to dismiss or in re-

fusing to set aside the verdict and judgment and render a judgment for defendant pursuant to its motion. We also conclude that the trial court did not err prejudicially in giving instruction No. 5, or in failing to instruct on proximate cause, or in admitting exhibits Nos. 2 to 13, inclusive.

We turn then to plaintiffs' cross-appeal assigning that the trial court erred in overruling their motion for an allowance of attorneys' fees. In that connection, section 44-381, R. R. S. 1943, provides in part: "The court, upon rendering judgment against the insurance company upon any such policy of insurance mentioned in section 44-380, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs." Such policy of insurance mentioned in section 44-380, R. R. S. 1943, is one "written to insure any real property in this state against loss by fire, tornado, or lightning, * * *."

In Eddy v. German Ins. Co., 51 Neb. 291, 70 N. W. 947, this court said: "The right of a litigant in any case at law to recover costs is a statutory right; and in order that a litigant may recover an attorney's fee as part of his costs in a suit against an insurance company he must bring himself within the provisions of * * *" the applicable and controlling statutes.

Also, in Branson v. Branson, 84 Neb. 288, 121 N. W. 109, dealing with allowance of attorneys' fees, this court held that: "The power to award and tax costs in legal proceedings being unknown at common law, statutes providing therefor are to be strictly construed."

It is plaintiffs' contention that whenever the risk of loss by fire, tornado, or lightning is included in any insurance policy on real property in this state, then a judgment secured on any type of loss covered by the policy will entitle successful plaintiffs to an allowance of attorneys' fees taxed as costs in the proceedings. We do not agree. Here we are dealing with a policy called a "Comprehensive Dwelling Policy" containing

many different types of coverage organized into five different groups, and involving a multiplicity of risks in addition to fire, lightning, windstorm, and hail. Plaintiffs in this action recovered a judgment under the separate "collapse" coverage provision thereof, and not for any loss by fire, lightning, or windstorm, yet they contend that they were entitled to an allowance of attorneys' fees simply because the policy insured their real property from loss by fire or lightning for which they neither sought nor received a judgment. On the other hand, defendant contends that where there is multiple coverage combined under the terms of one single policy, the actual nature of the loss determines whether the provisions of section 44-381, R. R. S. 1943, apply. We agree. The very wording of the statutes so indicate. See, Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N. W. 30; Security State Bank v. Aetna Ins. Co., 106 Neb. 126, 183 N. W. 92. We conclude that in order to recover an allowance of attorneys' fees under sections 44-380 and 44-381, R. R. S. 1943: (1) There must be a judgment recovered against an insurance company upon an insurance policy; (2) the policy must be one "written to insure any real property in this state against loss by fire, tornado, or lightning"; and (3) the actual loss must be caused by fire, tornado, or lightning. Otherwise, such statutory provisions would be extended far beyond the original intent of the Legislature and cover every conceivable type of loss, whether to real or personal property or otherwise which happened to be covered in a multiple risk insurance policy, which included provisions insuring against fire, tornado, or lightning.

We conclude that the trial court properly denied plaintiffs any allowance for attorneys' fees, and that the judgment of the trial court in all respects should be and hereby is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF PERL BOWER, DOING BUSINESS AS BOWER FREIGHT LINE, WOLBACH, NEBRASKA, FOR AUTHORITY TO OPERATE AS A COMMON CARRIER OF PROPERTY FOR HIRE IN NEBRASKA INTRASTATE COMMERCE.

PERL BOWER, DOING BUSINESS AS BOWER FREIGHT LINE, APPELLEE, V. GEORGE AND PERRY M. BUTCHER, DOING BUSINESS AS BUTCHER BROS., ET AL., APPELLANTS.

106 N. W. 2d 689

Filed December 16, 1960. No. 34829.

1. **Judgments.** If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order.
2. ———. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded.
3. ———. A nunc pro tunc order must conform to and be no broader in its terms than the one originally rendered.
4. ———. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth.
5. **Public Service Commissions.** Courts should, upon review, interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Nelson, Harding & Acklie, for appellants.

Cyril P. Shaughnessy, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

On August 18, 1959, Perl Bower, doing business as

Bower Freight Line, Wolbach, Nebraska, filed an application with the Nebraska State Railway Commission, hereinafter referred to as the commission, in Application No. M-8784, Supplement No. 1, seeking an order nunc pro tunc with reference to the commission's order of August 14, 1942, in Application No. M-1061, thereby seeking to include authority to serve St. Paul, Nebraska, in the regular route authority granted him by the commission in Application No. M-8784, Supplement No. 1, by an order dated December 28, 1948. The commission granted the relief sought and, by order nunc pro tunc, included both Grand Island and St. Paul as intermediate points on applicant's alternate regular route authority. Appellants, who intervened before the commission and objected to its granting the relief asked for, filed a motion for rehearing and reconsideration with the commission and have perfected this appeal from the overruling thereof.

The principles governing orders nunc pro tunc have been frequently stated by this court. They are as follows:

"If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order." North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869. See, also, Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475; Central West Investment Co. v. Barker Co., 79 Neb. 47, 112 N. W. 291. As stated in 30A Am. Jur., Judgments, § 592, p. 578: "Generally, a court has the authority and duty to amend records of its judgments and have the amendments entered nunc pro tunc, where the record of the judgment is not in accord with that actually pronounced in the cause and rendered."

"The function of a nunc pro tunc order is not to

correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded." Akins v. Chamberlain, 164 Neb. 428, 82 N. W. 2d 632. See, also, Lockard v. Lockard, 169 Neb. 226, 99 N. W. 2d 1; State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N. W. 2d 892; North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

"A nunc pro tunc judgment must conform to and be no broader in its terms than the one originally rendered." Phelps v. Wolff, 74 Neb. 44, 103 N. W. 1062. See, also, Lockard v. Lockard, *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra;* North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., *supra.*

"The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth." Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557. See, also, Lockard v. Lockard, *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

"Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights." Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.* The rule applicable to the foregoing is: "On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

The evidence discloses that Andy Nelson, doing busi-

ness as Nelson Freight Line of Wolbach, Nebraska, began hauling property for hire by motor carrier in intrastate commerce sometime in 1928 out of Wolbach, Nebraska. In 1937, the Legislature passed the Motor Carrier Act. Laws 1937, c. 142, p. 526. On December 17, 1937, Andy Nelson, doing business as Nelson Freight Line of Wolbach, Nebraska, was issued a certificate of public convenience and necessity under the so-called grandfather clause thereof for routes over which he was conducting services on April 1, 1936. Laws 1937, c. 142, § 7, p. 531. Route No. 1 of this certificate included St. Paul, Nebraska, as an intermediate point and Route No. 2 included Grand Island, Nebraska, as a terminus.

Route No. 1 of his authority, which permitted Nelson to go from Wolbach to Omaha with his trucks, did not permit him to return directly from Omaha to Wolbach but required him to return through Lincoln, Nebraska. To correct this inconvenient and uneconomical situation Nelson filed a request in writing with the commission on June 10, 1942, for that purpose. That he did so is evidenced by the commission's order of August 14, 1942, although the application itself could not be found. In response thereto the commission gave Nelson the relief he asked for, authorizing him to return from Omaha to Wolbach over the same route he was authorized to use in going from Wolbach to Omaha. However, in describing the authority Nelson was granted therein the commission did not include St. Paul as an intermediate point nor was Grand Island included in the same manner as before. It is this fact which caused the present application to be filed, for that deficiency continued to exist when the commission transferred Nelson's authority to Bower by its orders of June 10, 1948, and December 28, 1948, in Application No. M-8784, and Supplement No. 1 thereto.

In its order of August 14, 1942, the commission found: "* * * that the instant application should be granted;

that authority should be granted to applicant herein authorizing regular-routes operations as herein set forth and that the certificate of public convenience and necessity issued to applicant should be *clarified and corrected to conform to actual operations as conducted continuously from April 1, 1936 to date hereof.*" Based on these findings, it held: "* * * that the certificate of public convenience and necessity issued in Application No. M-1061 to Andy Nelson, d/b/a Nelson Freight Line, Wolbach, Nebraska, be, and the same is hereby, clarified and corrected to *conform to actual operations* and that a certificate of public convenience and necessity be, and the same is hereby, issued to applicant herein authorizing the following described operations, to-wit: * * *." (Emphasis ours.) In describing the authority so authorized the commission failed to include in Nelson's regular route authority, apparently through oversight in preparing the order, St. Paul and Grand Island as intermediate points thereon although the evidence establishes that Nelson actually served both of these cities as such on his regular routes during the period from April 1, 1936, to August 14, 1942, and, we might add, that Nelson and his successor have done so ever since. Under this situation an order nunc pro tunc by the commission, in order to correct this oversight in the commission's order of August 14, 1942, was proper and within the principles hereinbefore set forth.

We shall not trace the transfer of Nelson's authority to that of applicant. It is apparent that the commission, in doing so, transferred to applicant all of the authority that Nelson had, which would include what has now been fully described by the order nunc pro tunc. In view of what we have said we affirm the order of the commission.

AFFIRMED.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

106 N. W. 2d 727

Filed December 16, 1960. No. 34831.

1. **Appeal and Error.** The purpose of assignments of error required by the rules of this court is to advise appellee and the court of the issues on appeal which are submitted for consideration and decision.
2. ———. The consideration of an appeal in this court is limited to errors assigned and discussed except the court may consider a plain error not assigned or discussed.
3. **Vendor and Purchaser.** An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the optionee that he has the right to buy the property according to the terms and conditions of the option.
4. ———. Such an option does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated.
5. **Eminent Domain: Vendor and Purchaser.** A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option.
6. **Landlord and Tenant: Vendor and Purchaser.** A provision in a lease of real estate giving to the lessee the right and election to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extension or amplification of the estate granted by the lease.
7. **Eminent Domain: Vendor and Purchaser.** A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation.
8. **Trial: Damages.** It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict.
9. **Trial: Appeal and Error.** The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings, and an improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it may have influenced the verdict.
10. ———: ———. If it does not appear from the record that an improper matter submitted to the jury for its consideration by

the trial court did not affect the result of the trial unfavorably to the party against whom it was admitted, its reception must be considered prejudicial error.

11. **Municipal Corporations.** The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances.
12. **Trial: Appeal and Error.** Whether or not there was error in a sentence or part of an instruction, it will be considered with the instruction of which it is a part and all the other instructions. The meaning of the instruction will not be determined from a single or separate phrase or paragraph but by considering the instructions as a whole.
13. **Eminent Domain.** Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare.
14. **Landlord and Tenant.** The volume of business done on any given leasehold has a direct relation to the value of the leasehold as volume is directly connected with the success of the business and diminution of business means decrease in volume.
15. **Eminent Domain.** A landowner must recover all his damages caused by the taking of land from him by condemnation and which may arise on account of the proper construction and the future operation of an improvement for which the land was taken in the condemnation proceeding.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Phillips Petroleum Company, appellee, appealed to the district court for Douglas County from the assess-

ment of damages made by the appraisers appointed in proceedings initiated in the county court of Douglas County by the City of Omaha, appellant, for the appropriation by the exercise of the power of eminent domain of specifically described real estate within the city for use by it in the improvement of streets. The contesting parties in this court are Phillips Petroleum Company and City of Omaha.

The substance of the amended petition of appellee in the district court was that it was a corporation authorized to do business in Nebraska; that appellant was a city of the metropolitan class of Nebraska; that appellee was at all the times important to the litigation the lessee of the real estate involved herein; that its lease of the premises provided that the lessee should have an option to purchase the leased premises free from any encumbrances at any time during the term or any extension or renewal of the term of the lease for an amount stated therein; that on November 4, 1954, appellant commenced condemnation proceedings to acquire the described premises; that the award of the appraisers appointed therein made to appellee was $6,325; that the real estate involved was a part of a tract used for many years and then used by appellee as a service station; that it had been by appellee improved by placing thereon buildings and concrete driveways, and installing equipment and other things usual and incidental to such a modern place of business; that the taking of the property described herein, the changing of the grades, and the constructing of improvements for which the land was taken have damaged the property of the service station tract not appropriated, and necessitated the alteration of the service station facilities and reconstruction of various improvements including removal of diesel and truck fuel tanks, removal of liquid propane gas tanks, removal and replacement of pump islands, removal and grading of concrete driveways and replacement of concrete surface thereon, replacement of signs, incidental wiring,

and installation of equipment; that by reason of the facts alleged appellee had been caused damage to the property not taken of $12,500 and damage by reduction in the market value of the premises remaining because of the loss of the part taken of $30,000; and that appellee refused the award made by the appraisers and has, as provided by law, prosecuted an appeal therefrom to the district court for Douglas County. Appellee asked from appellant the sum of $42,500.

The answer of appellant was in substance an admission of the appropriation by it of the real estate involved by the exercise of the power of eminent domain; an allegation that the award of the appraisers to appellee was fair and just for the damages sustained by it; and a denial of all other matters stated by appellee in its amended petition.

The result of the trial of the issues made by the pleadings had to a jury was a verdict for appellee of $13,168.80. A motion for new trial was denied. This appeal is from the judgment and the order denying a new trial.

The property leased by the appellee from the owner of it consisted of about 10,000 square feet located at the southeast of the intersection of Dodge and Seventy-second Streets in the city of Omaha. The former was north and the latter west of it. The property was irregular in shape and it was roughly somewhat like the shape of home plate of a baseball diamond with the base or longest property line thereof being to the north along the south boundary of Dodge Street. Appellee secured a lease of the ground, which was unimproved, July 1, 1935, and soon thereafter it modestly improved it as a motor vehicle service station, hereafter designated station, appropriate to the conditions then existing. Appellee constructed thereon a cottage-type building without any service bay in which to wash, polish, or service motor vehicles. Appellee put in three pumps in the front of the building which faced Dodge Street and two pumps to the west of the building on the Seventy-

second Street side. It installed lights, wiring, and signs.

The site of the station was in 1953 substantially cleared and an entire new modern one was erected including the construction of a new building consisting of an office, two bays in which to service motor vehicles, two new pump islands and four pumps on Dodge Street, and a pump island and two pumps thereon on the Seventy-second Street side. The station area and the driveways on the Dodge Street side were paved. On the Seventy-second Street side the graveled surface was continued because of the contemplated widening of that street. All facilities and modern incidentals were installed including those for supplying liquified petroleum gas to the public. There were then four 35-feet-wide drives for access of vehicles to and from the station, two on the Seventy-second Street side and two on the Dodge Street side. A part of the street right-of-way between the property line of the leased property and the curb line of the streets was improved by appellee as a part of the driveways as access to and from the station. The grade of the station site when it was improved in 1953 was established in harmony with the street grade or elevation at the south edge of the pavement on Dodge Street and at the east edge of the pavement on Seventy-second Street. This was the situation when the condemnation proceedings were commenced for the appropriation by the city of 523 square feet of the area leased by appellee at the northwest corner or part thereof for use of appellant in enlarging the rights-of-way of and improving each of the streets at the intersection and for a considerable distance from it.

The north property line of the land condemned by appellant was the south right-of-way line of Dodge Street. The west line of the property condemned extended substantially north and south from Dodge Street for about half of the distance of the line and then it ran somewhat in a northeasterly direction. The other boundary line of the area taken was a curved line extending from the

south end of the property line thereof on the west to the east end of the property line thereof on the north. The south point of the area taken was near the south boundary line of the south driveway from Seventy-second Street into the station and the east point of the area taken extended east about two-thirds of the width of the west driveway from Dodge Street into the station. This resulted in the station being deprived of each of these driveways as they existed before and at the time of the condemnation.

After the condemnation in 1955 Seventy-second Street was changed and improved from a point north of Dodge Street south to Pacific Street, and Dodge Street was changed and improved for about 1,300 feet east and west of Seventy-second Street. The intersection of Dodge and Seventy-second Streets was made a channelized intersection which means that traffic islands were installed therein to channel traffic in places where the highway authorities believed they belonged. Structures were placed in the intersection to control the traffic and all four legs of the intersection had channelizing islands in each quadrant of it to separate the right-turn vehicles from the through traffic. The purpose of this was to facilitate the improvement of right-turning traffic and separate it from through traffic so that the former could proceed without being interfered with by the traffic going through the intersection. This character of transformation of the intersection was thought to be justified because of the volume of the traffic using it. The result of the changes made and structures erected in the streets at and near this intersection eliminated the easy access to the station as it existed before the condemnation. There had been ingress and egress to the station from Dodge Street by the two driveways toward the east of the site of the station and this gave a good angle of approach. After the condemnation a sharp turn into it was required. The egress from the station to Seventy-second Street was

lost to the station. The free right turn from Seventy-second Street into Dodge Street gave traffic the right and freedom to make that turn without interference and this made it very difficult for Dodge Street traffic to turn and get in the station from Dodge Street. Traffic moving north on Seventy-second Street could not get into the station and be served at it and then return to that street and resume its travel to the north. The station had the benefit of traffic both ways, north and south, on Seventy-second Street before the condemnation but since then southbound traffic desiring to continue south must make a left turn on Dodge Street and enter the station. After it is served it must return to Dodge Street and go east on it because of the dividing center island on that street which extends about a block and a half to the east. All westbound traffic on Dodge Street is lost to the station because it cannot cross that street and enter the station. Likewise, traffic going north on Seventy-second Street which desires to turn west on Dodge Street cannot enter the station because it cannot leave it and go west on that street.

After the condemnation and the changes in the streets there was only one driveway into the station from Seventy-second Street and it was near the south part of the station site. There were two entrances to it from Dodge Street. Traffic northbound on Seventy-second Street had a free turn to the right into Dodge Street, that is, a means of turning to the right against the traffic-control lights and merging into the general traffic flow in the direction of the turn, and this had an adverse effect on entrance of vehicles into the station from Dodge Street because normal traffic on that street was constantly conflicting with the merging traffic in front of the station entrances. The things recited above were a damage to the remaining station site because the evidence is that it is necessary to a station operation to have ease of ingress and egress to accommodate traffic to and from it.

There was evidence that the grade or elevation on Dodge Street was changed from what it was before the condemnation. The changes shown at three stations on the north property line were 1.38 feet, 1.00 foot, and 1.05 feet, respectively. Appellee prepared plot plans of the station for use in remodeling it in 1953. The plans were submitted to appellant for approval when appellee applied for a building permit to do the work. The plans showed the grades proposed on the station site. The slope between the property line and the curb line of the paving before the condemnation was about one-fourth inch per foot. Appellant saw and approved these plans before the construction.

There was evidence that the best use of the property leased to appellee was a station; that repairs, replacement, and alterations were required to be made to the station site after the condemnation and the street improvements had been completed; and that the reasonable cost of such restoration was proven as a separate element of severance damage not included in the lost market value of the remainder of the property.

There was proof of all elements and items of damage alleged by appellee in its amended petition, the total of which was greatly in excess of the amount of the verdict. It is assumed, as it is required to be because of the character of the case and because the finding of the jury was for appellee, that all controverted matters were on the trial resolved in favor of it. Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913.

The assignment of appellant that the court erred in overruling its motion for a new trial is too general to require any consideration on this appeal. Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628. Likewise, the failure of appellant to discuss the assignment in its brief disregards the requirement of the rules of this court that an assignment to require the consideration of the court must be discussed by the party making it. Revised Rules of the Supreme Court, rule 8a 2(4). Hart-

man v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

The trial court as a part of instruction No. 1 advised the jury that appellee alleged it was lessee of the real estate described in its amended petition and involved herein; that the lease contained in substance a provision that the lessee shall have an option to purchase the leased premises free of liens and encumbrances at any time during the extension or renewal term of the lease for the sum of $15,000; and that the lease had been extended and renewed for a period expiring August 2, 1961. The substance of a subsequent part of the charge to the jury said that it should return a verdict for appellee if it had established by the greater weight of the evidence that it had been damaged by reason of the condemnation proceeding in one or more of the respects charged by it in instruction No. 1, the nature and amount of the damage, and the amount which would be fair and just compensation to appellee for any loss to it. Appellant argues that the jury should not have been advised of the option provision of the lease because it was foreign to any issue in the case; that the instructions noticed above invited and permitted the jury to consider the option and to compensate appellee for any damage the jury found it sustained because of the condemnation of a part of the real estate in reference to which the option was granted; and that an option to purchase real estate which has not been exercised does not create an interest in the optionee entitling him to an award in condemnation proceedings appropriating a part or the whole of the real estate. This invites a consideration of the character and effect of an option.

In Keogh v. Peck, 316 Ill. 318, 147 N. E. 266, 38 A. L. R. 1151, the court said: "An option, originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain. The

owner does not then sell his land or any interest in it. He does not then agree to sell it, but he does then sell the right or privilege to buy at the election or option of the other party. The second party gets, in praesenti, not lands or an interest therein, or an agreement that he shall have lands, but he does get something of value,—that is, the right to call for and receive lands if he elects."

Morgan v. Forbes, 236 Mass. 480, 128 N. E. 792, contains the following: "An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such an agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified. It is merely the right to an election which has been sold and the owner of this right is not bound to complete the sale." See, also, Annotation, 87 A. L. R. 566; 67 C. J. S., Option, p. 511.

It has been decided that an option for the purchase of real estate by the optionee may not before it is exercised be considered in the assessment of damages caused by condemnation of the real estate.

Cravero v. Florida State Turnpike Authority (Fla.), 91 So. 2d 312, states: "We agree with the trial judge that the Craveros had only an option to purchase and that an option to purchase which has not ripened into a mutually binding contract by having been exercised prior to the time of the entry of the award is not such an interest in the condemned property as to entitle the optionee to share in the award."

East Bay Municipal Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 P. 476, states: "An option to purchase land does not constitute an interest in the land itself, but it is a mere right of election to accept or reject a

present offer within the time fixed, and the holder of a mere option to purchase lands sought to be condemned is not entitled to any part of the compensation to be paid therefor, nor to any damages by reason of the severance of such lands from other lands owned by him."

In Cornell-Andrews Smelting Co. v. Boston & P. R. R. Corp., 209 Mass. 298, 95 N. E. 887, it is said: "An option, giving to the lessee of real estate a right at his election to buy the fee at any time during the term of the lease, although it adds to the value of the lessee's rights under the lease, is no part of the lessee's estate in the land, but is merely a contract right." In the opinion it is said: "We understand that the learned counsel for the petitioner in effect concedes that ordinarily the only person who can bring a petition for compensation is the owner of an estate in the land. His argument is that the option added to the value of the lessee's leasehold interest, and if it did he has asked with great insistence why the petitioner should not have compensation for the diminution in the value of all his rights under the lease including the option. * * * But the real objection to this contention is that, although the insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right and nothing more, although contained in the lease and although it is a contract right which passes to an assignee of the lease. It is not an extension or amplification of the lessee's estate. * * * The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land. Being rights which lie in contract, the lessee as the holder of such an option cannot bring a petition for damage done to the land, or intervene in one brought by the owner of an estate in the land. Neither can he in a petition brought by himself as lessee (to recover the compensation due for damage done to his estate in the land) have the value

of his estate in the land increased by the value of the option."

People v. Ocean Shore R. R. Co., 90 Cal. App. 2d 464, 203 P. 2d 579, adopted the following from a prior opinion: " 'The primary question here is the nature and extent of Middleton's interest in the property at the time of the taking by the state. If the agreements here constituted merely an option to purchase, then the exact date of the taking by the state becomes unimportant, as "The holder of an option to purchase land being condemned has no interest in the land which will entitle him to compensation * * *" (29 C. J. S. 1101; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240 [278 P. 476, 279 P. 178].)' "

Appellee argues that the doctrine of the foregoing cases is not applicable in this jurisdiction because the owner of an interest in property less or different than an estate in real estate is permitted to recover compensation in condemnation. Appellee presumes to sustain this hypothesis in this manner: The statute does not restrict compensation for loss caused by condemnation only to those possessed of an estate or interest in real estate. The statutory definition of property is any interest in real or personal property as the condemner is empowered by law to acquire for public use. § 76-701, R. R. S. 1943. The constitutional provision is that no property shall be taken or damaged for public use without just compensation. Art. I, § 21, Constitution of Nebraska. This case is a condemnation by appellant by virtue of its charter provision enabling it to exercise the power of eminent domain the substance of which is that the council may acquire, by the exercise of the power of eminent domain, private property or public property which is not devoted to public use, for municipal purposes, including street purposes. § 14-366, R. R. S. 1943. Therefore, this state does not limit the recovery of compensation to the owner of an interest or estate in real estate but it ex-

pressly provides for compensation for the appropriation of or damage to personal property by condemnation. Appellee says this court has recognized this doctrine. State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196.

The courts of New York discussed a similar contention. In In re Water Front in Tompkinsville, 219 App. Div. 387, 220 N. Y. S. 23, the appellate division decided that a lessee with an option to purchase real estate was entitled to be compensated for the value of the option in proceedings involving the real estate because that state permitted the owner of an interest less than an estate or interest in land to have compensation in condemnation. In that decision it is said: "But it is claimed by respondent that a lessee's option to purchase is not an estate for which he is entitled to recover compensation in addition to the value of his leasehold, citing 20 C. J. 742, § 194, and Cornell-Andrews Smelting Co. v. Boston & P. R. Corp., 209 Mass. 300, 95 N. E. 887. I do not think, however, that these authorities have any application to the case at bar, because, under the statute which governs the right to compensation for taking property in condemnation, in this proceeding, such right does not depend upon the possession by claimant of an estate, legal or equitable, in the land, as that term is usually understood in the law." It was also held therein that a provision in the lease which contains the option that if the premises involved were taken by eminent domain the lease should cease and come to an end, applied only to the lease and not to the option. That decision was disapproved by the Court of Appeals in In Re Application of City of New York, 246 N. Y. 1, 157 N. E. 911, in which it is said: "The tenant in this case had not exercised its option at the time title was taken by the city, October 11, 1919. In fact, it has never exercised its option. The option alone gave the lessee no interest in the real estate. He became a purchaser only upon the due exercise of the option. * * * The

reason for this is apparent. If the lessee had exercised his option prior to condemnation, he would be bound by his election as well as the owner. Therefore, if the premises should bring on condemnation less than the option price, the tenant nevertheless would be obliged to pay the difference, or the full option price to the owner. The reverse would also be true. The tenant would be entitled to receive the value of the award, although the option price were less. In other words, by the exercise of the option, the rights and obligations of the owner and the lessee became mutually binding. The New York Dock and Warehouse Company, Inc., claims that this option is one-sided, and only binding on the owner, and frankly states that if the award had been less than its option price, it would have been under no obligation to buy the property or take the award, and pay the owner the difference. It has the privilege, so it claims, of waiting until the award is made, and then, finding that the amount is in excess of the option price, claim an election and the right to the difference, which in this case is over $100,000. Such a thing cannot be * * *." The Court of Appeals also decided that the provision in the lease for its termination in the event the property involved was condemned rendered the option void.

The deficiency in the argument of appellee in this regard is that an option does not create an interest or estate in real estate or personal property. An unexercised option is essentially a unilateral contract which permits the optionee to make an election concerning the subject matter designated therein within a period prescribed. In 67 C. J. S., Option, p. 511, the following appears: "However, the very meaning of the word 'option' implies a right to act or not as the optionee may choose, and in this sense the word has been variously defined as meaning the right of choice; right of election to exercise a privilege; * * * the exercise of

the power of choice which may or may not be exercised." See, also, Annotation, 87 A. L. R. 566.

Appellee argues that an option is a right to acquire an interest in real estate and is, therefore, an equitable interest and that this court has decided an equitable owner of property is entitled to damages for injury thereto. City of Nebraska City v. Northcutt, 45 Neb. 456, 63 N. W. 807, is apparently the authority relied upon by appellee as supporting this argument. It falls far short of doing this, as the following language therein demonstrates: "Presumably, the improvements when made became a part of the realty and the property of its owner, and no right of action accrued to the plaintiff because he made them, unless he retained ownership or had some estate in the land; and in the latter case he could only recover for the injuries sustained by his particular estate. In so holding we must not be understood as deciding that one must be the owner of land in fee simple in order to recover damages for a change of grade. We simply hold that one must have some legal or equitable estate, and that his damages are confined to the injuries done that estate."

Los Angeles County Flood Control Dist. v. Andrews, 52 Cal. App. 788, 205 P. 1085, declares: "Appellant contends that at the time of the issuance of summons * * * it was an equitable owner of the land sought to be condemned. This claim is made because of the unusual manner in which Horsford indicated his execution of the option agreement. * * * Couched as the instrument was, his signing in the manner in which he did placed him in no different position than if he had merely appended his name after that of the secretary of the trust company. And his being a party to the paper was of no significance whatever. It was purely unilateral, for he made no promises above his signature, he covenanted to do nothing. In short, and without dissection of the instrument, it is plain to be seen that it was nothing but an option; and when an option is signed by

the optionee it is not because of that signature to be dignified by a higher name."

It was the duty of the trial court to instruct the jury as to each element or item shown by evidence which it should have considered in deciding the amount of the verdict appellee was entitled to have. The jury should not have been informed by the trial court of any matter which was not proper for it to have considered in arriving at a verdict in the case.

In Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224, it is said: "It is the duty of the trial court to instruct the jury fully and fairly as to items of damage it should consider in arriving at its verdict and as to the proper basis upon which damage should be assessed for each item." See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551.

The jury was informed by the trial court of the option and it must be assumed that it considered the existence of it and the amount of any damage to the option of appellee because of the condemnation. There was evidence indicating that the option had a substantial value. The option price of the property, the subject of it, was $15,000. The property, by proof produced by appellant, was shown to have a value in excess of $42,000 and the evidence of the value thereof offered by appellee tended to show a value of $60,000. The expert appraiser who gave evidence at the instance of appellant referred to the value of the property in excess of the option price of $15,000 as the sum of $27,000 according to his opinion of value. He said this was "bonus value" which existed because of the option. It cannot be determined from the record that the submission of the option to the jury by the trial court did not materially influence the jury to the prejudice of appellant in the amount of the verdict in favor of appellee.

Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, states: "The proof in a trial of a jury case must be confined to legal evidence tending to

prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial error if it may have influenced the verdict. * * * If it does not appear from the record that evidence wrongfully admitted in the trial of a jury case did not affect the result of the trial unfavorably to the party against whom it was admitted its reception must be considered prejudicial error." See, also, Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170; Barton v. Wilson, 168 Neb. 480, 96 N. W. 2d 270. The instructions given by the court advising the jury of the option for its consideration in deciding the amount of the recovery for appellee was prejudicial error.

Appellant complains of instruction No. 4 because it says the instruction conveys the impression that appellee was entitled to access between the property of which it was lessee and the street at all points necessary to the business of appellee. The language of the instruction in this respect was as follows: "The measure of the right of the property owner or lessees standing in the place of such owner is reasonable ingress and egress under all the circumstances, and he is not entitled to access to his land at all points in the boundary between it and the street but is limited solely to those points that are reasonably necessary in his business." A fair interpretation of that language of the court is that the measure of the right of appellee to access to the station property to and from the street was the ingress and egress which were reasonably necessary to the business there conducted and which was reasonable under all the circumstances. This did not conflict with the doctrine of this court on that subject. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, states: "The owner of property abutting on a street is not entitled, as against the public, to access to his land at all points in the boundary between it and a street, although entire access cannot be denied him. The measure of the right of the property owner is reasonable

ingress and egress under all the circumstances." In the immediately following paragraph of the instruction the court used the expression: "* * * and if from a preponderance of the evidence you find that such ingress and egress were reasonably necessary * * *" and because the court did not add to the words quoted the admonition "under all the circumstances," appellant says the instruction was prejudicially erroneous.

In Fielding v. Publix Cars, Inc., 133 Neb. 818, 277 N. W. 331, this court stated: "In instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party, if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence."

An instruction will not be considered prejudicially erroneous because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury in deciding the case. Whether or not there was error in a sentence or part of an instruction, it will be considered with the instruction of which it is a part and all the other instructions. The meaning of an instruction will not be determined from a single or separate phrase or paragraph but by considering all that is said on each subject or branch of the case. An admonition such as "under all the circumstances" used in one paragraph is not required to be repeated in each subsequent paragraph thereof which refers to the same subject. In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526; Bolio v. Scholting, *supra;* Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423.

Appellant complains that the final paragraph of instruction No. 4 permitted the jury to award any damage it found to have been occasioned appellee by the changing or widening of the streets. Instruction No. 5 told the jury that the ownership by appellant of land adjoining the old portion of the street and over which appellee had constructed its driveway did not affect

the right to recover damages suffered by appellee because of interference by appellant with the right of appellee to ingress and egress to and from its station. Instruction No. 7 said appellee could recover the reasonable cost of making changes in the location of its operating units and facilities and change in the surface if they were caused and made necessary by the condemnation of the part of the property taken.

Appellant says the damages mentioned in the last paragraph of instruction No. 4 were not restricted to those caused by the condemnation. The immediately preceding paragraph of the instruction concerning other items of damage that the jury was to consider commenced with the words: "If through the condemnation and improvement in the street plaintiff was affected * * *" and the last paragraph started with the words: "In addition, if you find from a preponderance of the evidence * * *." Thereby the subject of each of the paragraphs was limited to things resulting from the taking of a part of the property and the improvements made in the streets because of the taking.

Appellant substantially argues that the court in giving instructions Nos. 4, 5, and 7 failed to recognize the right of a municipality to exercise the police power delegated to it in reference to its streets. § 14-301, R. R. S. 1943. The essence of the contention in this respect is that damages resulting from the exercise of the police power by appellant are not compensable. The fact that appellant had under the police power the right to improve its streets and thereby control the traffic thereon does not mean that it had immunity from liability to respond in damages which resulted to private property abutting the improvement where a part of the property of appellee was taken by condemnation. The exercise of police power may or may not involve the taking of private property and it may or may not involve mere noncompensable inconvenience to the owner thereof. The distinction is not whether it is a valid exercise of

police power but whether or not the property itself is taken or damaged. In 18 Am. Jur., Eminent Domain, § 11, p. 639, the author says: "The real distinction, however (between eminent domain and the police power), lies in the fact that in eminent domain property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may, and often does, take property in the constitutional sense so that it must be paid for, this is not accomplished by a transfer of ownership, but by destroying the property or impairing its value."

This is a condemnation proceeding originated by a petition of appellant which characterizes it as such. The petition asked the appointment of appraisers to determine the compensation appellant was required to pay in the manner and to the extent required by law, and of course there was not and could not have properly been any claim in the petition that the appellant was exempt from obligation to pay damages by reason that the municipality was exercizing the police power. Thereby appellant subjected itself to liability for all damages sustained by the taking which this court has repeatedly held includes all elements and inconveniences which affect the market value such as " 'The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, * * * and like matters * * *.' " Crawford v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 832, 49 N. W. 2d 682.

In State ex rel. Westminster Presbyterian Church v. Edgecomb, 108 Neb. 859, 189 N. W. 617, 27 A. L. R. 437, this court quoted with approval from Chicago, B. & Q. Ry. Co. v. State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, the following: " 'Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a

police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same.'" See, also, City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543. The challenge of the instructions referred to above is not well founded and is not sustained.

Appellant contends that anticipated profits from a business cannot be considered in the assessment of condemnation damages and from that assumption appellant concludes that instruction No. 6 was wrong because it authorized the jury in finding the market value of the leasehold of appellee in the station property to consider the volume of business carried on there. There is no mention or evidence in the record of profits from the business conducted by the station on the site in question. The instruction strictly limited the consideration of the jury to the volume of business carried on by the station as it affected the value of the leasehold. This instruction has the approval of the decision in James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273, in which it was said: "The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume." The expert appraiser produced by appellant recognized this. He testified he was acquainted with the volume of business of numerous stations, that he had appraised many of them, and that the volume of business was a feature to be considered in determining the value of such a location. The instruction complained of was not objectionable.

Appellant claims error in connection with the matters loosely referred to as changes in the grade and because instructions Nos. 7 and 8 permitted the jury to consider severance damages resulting from the construction of the streets at a different level or elevation rela-

tive to the property line of the station site. This is based on the hypothesis that as a matter of law appellee was not entitled to any consideration of this element of damages. Appellant was liable to appellee for damages to the remainder of the property which resulted from the construction of the improvement in the streets for which the condemnation power was exercised. The measure of damages was the difference between the before and after value of the tract and "* * * every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property" were proper to be considered. Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521.

In the case of Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741, it was said, contrary to the argument of appellant: "Although conflicting, there is ample competent evidence in the record to sustain the verdict and judgment unless, as a matter of law, plaintiff was not entitled to recover consequential damages for depreciation in the value of his remaining land by severance and the construction of structures, embankment, and earthworks aforesaid, as argued by defendant. We conclude that such contention has no merit." See, also, Crawford v. Central Nebraska Public Power & Irr. Dist., *supra;* Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417. This is necessarily the correct conclusion because a landowner must recover all his damages caused by the taking of land from him by condemnation and which may arise on account of the proper construction and the future operation of an improvement for which the land was taken in the condemnation proceeding. Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442, stated: "It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the orig-

inal condemnation proceedings." See, also, State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593; Gruntorad v. Hughes Bros., 161 Neb. 358, 73 N. W. 2d 700; McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798.

The judgment should be and it is reversed and the cause is remanded to the district court for Douglas County for further proceedings according to law.

REVERSED AND REMANDED.

NORMAN B. MCDONALD, APPELLEE, V. RHEA RENTFROW, COUNTY SUPERINTENDENT OF SCHOOLS FOR SHERMAN COUNTY, NEBRASKA, ET AL., APPELLEES, IMPLEADED WITH HENRY THOMAS ET AL., APPELLANTS.
106 N. W. 2d 682

Filed December 16, 1960. No. 34833.

1. **Schools and School Districts.** The powers and duties imposed upon county superintendents of schools by section 79-420, R. S. Supp., 1955, are legislative in character.
2. ———. The exercise of the powers and duties delegated to county superintendents by section 79-420, R. S. Supp., 1955, are mandatory if the conditions exist which are described therein.
3. ———. Before the powers and duties prescribed in section 79-420, R. S. Supp., 1955, may be exercised, a county superintendent must give at least 15 days' notice to the legal residents of the district, which notice may be by mail or by publication in a newspaper of general circulation in the area.
4. **Schools and School Districts: Appeal and Error.** Secton 79-420, R. S. Supp., 1955, provides that an appeal may be taken from the action of the county superintendent to the district court but without providing a method.
5. **Appeal and Error.** Where no method of appeal is provided by statute the appropriate procedure is a proceeding in error.
6. ———. The district court was without jurisdiction to hear the appeal in this case except as a proceeding in error.
7. ———. The absence of jurisdiction of the district court may be taken advantage of at any stage of the proceedings.
8. **Schools and School Districts: Appeal and Error.** A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript.

9. **Appeal and Error.** The petition shall contain the assignments of error, and the transcript shall contain the final judgment or order sought to be reversed.
10. ———. In a proceeding in error in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed in the absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error.
11. ———. The transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings.
12. **Schools and School Districts: Appeal and Error.** In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent.

APPEAL from the district court for Sherman County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Thomas W. Lanigan, Wellensiek & Weaver, and *Richard L. DeBacker,* for appellants.

Dier & Barton, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

The inception of the action here was an order of Rhea Rentfrow, county superintendent of schools of Sherman County, Nebraska, dissolving school district No. 3 in that county; attaching the territory thereof to school district No. 8, a neighboring district also in Sherman County; and distributing the assets of district No. 3 to district No. 8. Norman B. McDonald, a resident and taxpayer of district No. 3, filed a supersedeas bond and thereupon filed in the district court for Sherman County, Nebraska, what he termed a petition on appeal and also a transcript of the proceedings before the county superintendent which led to the order which has been mentioned. Thereafter other pleadings were filed.

These pleadings will receive further attention later herein.

The petition of Norman B. McDonald designated him as plaintiff on appeal. He is appellee here. Rhea Rentfrow, county superintendent of schools of Sherman County, was designated a defendant. Henry Thomas, president of the board of education of school district No. 8, and Fred C. Teichmeier and Anton Weiss, as representatives of the legal voters of school district No. 3, were also made defendants. There are other defendants but none of them is in an active capacity before this court. Furthermore none of the other named defendants was declared by the petition to have in point of pleaded fact an interest within the meaning of any pertinent statute in the subject matter before the county superintendent.

The only irregularities charged in the petition are that the hearing was had without giving persons affected an opportunity to present evidence as to the educational welfare, needs, and necessity of the children of school age in school district No. 3, and without giving due consideration thereto; and that the educational welfare, needs, and necessity of the children of school age in school district No. 3 of Sherman County, Nebraska, require that at least a portion of said school district No. 3 be attached to and made a part of school district No. 30 of Howard County.

The defendants who have been named herein filed an answer. The only part which appears pertinent on the questions presented here is a denial of the allegations of the petition not admitted to be true.

An answer and cross-petition was filed by one Cleo Quest, one of the defendants named in the petition but who has not been previously named herein. His answer and cross-petition are as president and representative of the board of education and as representative of the legal voters of school district No. 30 of Howard

County, Nebraska. By these pleadings no claim is made to any interest in the subject matter of this action.

The case came on for hearing in the district court where it was heard de novo on the pleadings and on evidence adduced in that court. It was tried as an action on appeal.

At the conclusion of the trial the district court ordered and adjudged that school district No. 3 of Sherman County, Nebraska, be dissolved; that a part thereof be annexed to school district No. 8 of Sherman County, Nebraska; that a part be annexed to school district No. 30 of Howard County, Nebraska; and that the money and funds of school district No. 3 in the hands of the treasurer of the district be distributed in proportion to the assessed valuation of the real estate annexed to each of the districts.

The defendants Thomas, Teichmeier, and Weiss, who will be referred to hereinafter as appellants, have appealed from the judgment of the district court to this court. In this appeal Norman B. McDonald is appellee. The object and purpose of this appeal is to cause the judgment of the district court to be reversed and to cause the order of the county superintendent to be restored to the effect therein declared.

The brief of appellants herein contains numerous assigned grounds for reversal but it appears that before considering any of them specifically the history and the present status and quality of the statutory provisions involved should be pointed out and sufficiently analyzed.

The order and the proceedings throughout, as is disclosed by the order itself and the proceedings in relation thereto, flowed from section 79-420, R. S. Supp., 1955. This becomes clear and indisputable from the transcript which came from the county superintendent to the district court and thence to this court, and the pleadings of the parties with their declarations and admissions.

The powers and duties conferred by this section, in-

sofar as they are pertinent for present purposes, are that the county superintendent of a county shall dissolve a school district; shall attach the territory of the district to one or more neighboring school districts; and shall distribute the assets of the closed district to the other district or districts in proportion to the assessed valuation of the property attached to such district or districts. The exercise of these powers is mandatory and dependent upon a situation where there are less than three legal voters residing in the district; a failure to maintain a public elementary school within the district in which are enrolled and in regular attendance for at least 155 days one or more pupils of school age residing in the district; or the district does not contract for the tuition and transportation of pupils of such district with another district or districts and have pupils attending such other school or schools regularly for at least 155 days under such contracts.

Before exercising the powers and duties the county superintendent is required to give at least 15 days' notice to the legal residents of the district. Notice may be by mail or by publication in a newspaper of general circulation in the area. Appeals may be taken from the action to the district court of the county.

The question of whether or not there were three or more voters in district No. 3 is not involved. It is the other conditions which are of concern.

This section of the statutes is not by declaration therein or elsewhere made to depend, on the basis of substance or procedure, on any other phase of the school laws. It pertains to a subject which is not related to other provisions for organization, reorganization, or transfer of properties or school privileges. It is separate and distinct from all of these and has been so separate and distinct from its historical beginning down to the present time.

The subject matter was first introduced by Laws 1897, chapter 62, page 308. The powers and duties there

declared were not the same as those contained in the present section. The present ones however have come by specific amendment over the intervening period. That chapter, except the last section thereof which was merely an emergency clause, became sections 11522 to 11528, Cobbey's Annotated Statutes for 1907. There was an amendment to section 11523 in 1909 which amendment has no controlling significance here.

In 1949 there was a recodification of the school laws and it was then that the subject matter here became section 79-420, R. S. Supp., 1949. It embodied minor and unimportant variations by amendments which need not be mentioned here. There was however one significant change.

Up to that time the powers and duties of the county superintendent were burdened with certain conditions and certain discretion was allowed. However by this amendment, or in legislative terminology, enactment, the duty of the county superintendent to dissolve districts and distribute assets in the light of the conditions pointed out as being a part of the present section became absolute without notice and without right of appeal.

In 1953 the section was amended but in no particular requiring mention herein. Laws 1953, c. 291, § 2, p. 989. This amended section was amended early in the session of the Legislature of 1955, but as was true of the 1953 amendment it was in particulars not requiring mention herein. Laws 1955, c. 308, § 1, p. 952.

Later in the 1955 session it was again amended. Laws 1955, c. 315, § 5, p. 975. By this amendment it became for the first time since 1949 the duty of the county superintendent to give at least 15 days' notice to the legal residents of the district by mail or by publication in a newspaper of general circulation in the area before taking action. By this amendment the right of appeal from the action of the county superintendent to the district court was also provided.

There was an amendment in 1959, but this has no

bearing on the present proceeding since it did not become effective and controlling until after the county superintendent had acted with reference to the subject matter of the present action.

The powers and duties which were conferred by this provision of the statutes are and were legislative powers. The Legislature could exercise these powers itself or delegate them. This subject is covered fully in Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, where citations of other cases of like effect are noted. The opinion does not state specifically that these legislative powers may be delegated to county superintendents but from the context no other reasonable conclusion may be reached. It is pointed out that the delegation of such power must carry certain restrictions. In Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656, the power is specifically declared. The restrictive power will be referred to later herein.

It was pursuant to the power delegated to county superintendents by this statutory provision that Rhea Rentfrow, county superintendent of schools of Sherman County, Nebraska, according to the transcript before this court, on July 30, 1959, gave due notice of a public hearing to be had on August 21, 1959, at 2 p.m., at her office in Sherman County, Nebraska, for the purpose of dissolving school district No. 3 and attaching the district in whole or in part to a neighboring district or districts; that a hearing was had at the time designated; that at the conclusion of the hearing district No. 3 was dissolved and annexed to district No. 8 in Sherman County, an adjacent district; and also at that time the assets of district No. 3 were transferred to district No. 8.

To avoid confusion it is pointed out here that no question is raised as to the propriety of the dissolution of district No. 3. In fact the petition on appeal which has been referred to declares that "the County Superintendent of Schools of Sherman County, Nebraska, had a duty to dissolve said district and attach the same to

one or more neighboring school districts." The only basic question which is or has been before the courts is the propriety of the attachment of all of district No. 3 to district No. 8.

It is of course apparent that this court is called upon to make a determination upon the propriety of the order of the county superintendent, the appeal therefrom, and the consequent judgment of the district court. This requires first ascertainment of the true significance and force and effect of the appellate proceeding from the action of the county superintendent.

As has already been made clear the appellee instituted his action by what he denominated "petition on appeal." In essence however it amounted rather to a petition in error. In From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441, in dealing with a matter in which a dissatisfied party was given a right of appeal, it was said: "It seems self-evident that the Legislature intended, by the statute it enacted, to extend to any parties coming within the scope thereof the right to an appeal which would entitle them to a retrial of the whole cause but failed to provide any procedural method for lodging jurisdiction thereof in the district court. This failure of the statute to so provide defeats the right for, as already stated, the right to appeal together with the mode and manner thereof are purely statutory." This declaration was approved in Jungman v. Coolidge, 157 Neb. 122, 58 N. W. 2d 828. Accordingly it must be said that the appellate proceeding from the action was not an appeal.

In From v. Sutton, *supra*, it is pointed out that a proceeding denominated an appeal may, if legal requirements are met, be treated as a proceeding in error. It appears that the essential requirements have been met in this case, and it is held that the pretended appeal from the action of the county superintendent was properly a proceeding in error. It is suggested in the brief of appellee, although not directly urged, that by the de-

cision in Roy v. Bladen School District No. R-31, 165 Neb. 170, 84 N. W. 2d 119, the rule does not obtain here. The answer to that is that in that case the statute being interpreted along with the declaration of the right of appeal also prescribed the procedure therefor. See § 79-403, R. R. S. 1943.

This question has been made the basis of an assignment of error by the appellants in this court. The appellee urges that it is not available for consideration for the reason that it was not presented by motion for new trial. This contention may not be sustained. This court said in Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120: "Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by Constitution or statute." See, also, Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515; From v. Sutton, *supra;* Jungman v. Coolidge, *supra.*

A proceeding in error must come to the appellate court on petition in error and a transcript. §§ 25-1903 and 25-1905, R. R. S. 1943; From v. Sutton, *supra.*

It is required that the petition shall contain the assignments of errors complained of. § 25-1903, R. R. S. 1943. It is required that the transcript shall contain the final judgment or order sought to be reversed. § 25-1905, R. R. S. 1943.

In an error proceeding in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed where there is an absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error. Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90.

No bill of exceptions was presented to the district

court, hence there was no evidence to examine for the purpose of determining whether or not the order of the superintendent was in point of fact erroneous. There was nothing therefore except the transcript to which reference was available to ascertain whether or not there was error.

It is also true that the record fails to disclose that any objections were filed or otherwise taken to the proceedings leading to the hearing by the county superintendent or at the hearing itself. Also there is no record of any exception taken thereafter and presented to the county superintendent. The first step taken was the filing of the "petition on appeal."

In the light of this the district court had only the transcript from which to ascertain whether or not the order of the county superintendent was erroneous. The rule is that the transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings. In re Estate of Bednar, 151 Neb. 242, 37 N. W. 2d 195; Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N. W. 2d 191; Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

The opinion in Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N. W. 2d 58, makes it clear that this rule is applicable in cases such as this one.

As has been pointed out the petition which was filed in the district court by the appellee charged two irregularities on the part of the county superintendent. They will be referred to here as assignments of error. The first is that the hearing was had without giving persons affected an opportunity to present evidence as to educational welfare, needs, and necessity of the children of school age in school district No. 3, and without giving due consideration thereto.

This contention is on the record without merit. There is no bill of exceptions and nothing in the nature of exceptions or otherwise in the transcript to support it. Instead of there having been no hearing the transcript

declares directly to the contrary, and, as pointed out, it is not shown that any effort was ever made before the county superintendent to lay a foundation for impeachment of what appears in the transcript. The transcript must be accepted as true.

The second assignment is that the educational welfare, needs, and necessity of the children of school age in school district No. 3 of Sherman County, Nebraska, require that at least a portion of school district No. 3 be attached to and made a part of school district No. 30 of Howard County.

There is nothing in the statutory provision under which the county superintendent acted, or its antecedent history which has been described, which required her to do less or more than was done by her. She did and performed according to the mandate of the statute. The exactions which the appellee would impose are not to be found in this statutory provision or in the area of its operation. It is of course true that such exactions are contemplated by other statutory provisions and procedures but they are foreign to this statute.

What was done here was in the exercise of legislative power properly delegated by the Legislature to the county superintendent. Nickel v. School Board of Axtell, *supra.* In pursuance of this delegated power the county superintendent could do what was done by the order in question without the consent and over the protests of residents or taxpayers in the district. See, Nickel v. School Board of Axtell, *supra;* Schutte v. Schmitt, *supra.*

This being true it was the duty of the district court to overrule the exceptions contained in the petition in error. It thereupon became the duty of the court to affirm the action of the county superintendent and the duty of the clerk of the district court to certify the decision to the county superintendent. See, Dovel v. School Dist. No. 23, *supra;* § 25-1909, R. R. S. 1943.

The judgment of the district court is therefore re-

versed and the cause remanded with directions to affirm the action of the county superintendent which affirmance shall be certified by the clerk of the district court to the county superintendent.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STANDARD RELIANCE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. RUTH SCHOENTHAL ET AL., APPELLEES.

106 N. W. 2d 704

Filed December 16, 1960. No. 34834.

1. **Vendor and Purchaser.** The exercise of an option to purchase real estate, in order to be effectual, must be identical with the terms of the option agreement and unconditional.
2. ———. An option holder cannot enforce the option to purchase real estate until he elects to and binds himself to perform it, thereby giving mutuality to optionor's offer to sell by optionee's acceptance of it.
3. **Vendor and Purchaser: Equity.** Though an election to accept and exercise an option to purchase real estate is necessary to bind the optionee, the act of filing a bill in equity, within the time for exercising the option, declaring such acceptance and election is sufficient when accompanied by the payment into court of the purchase price fixed by the option agreement, since optionee thereby places himself under all the obligations of the option agreement.
4. **Vendor and Purchaser: Specific Performance.** Where in such an action the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its terms, and in all respects offers to do equity, the basis exists for the granting of such relief.
5. **Vendor and Purchaser.** A demand for a warranty deed contrary to the terms of the option agreement is not an acceptance or exercise of the option, but is a counteroffer.
6. **Pleading.** The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action which are supported by the evidence the court will grant the proper relief, although it may not conform to the relief prayed for.
7. ———. The prayer of a petition is no part of the essential

pleading, it tenders no issue, and neither adds to nor takes from the evidence required of either party.

8. **Equity: Pleading.** A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court.

9. **Vendor and Purchaser: Equity.** The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement made after the execution of the option agreement and before the option could be exercised by its terms is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court.

10. ———: ———. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Mason, Knudsen, Dickeson & Berkheimer, for appellant.

Field & Ricketts and *Cecil F. Parker,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit in equity to obtain the specific performance of an option contained in a contract and deed for the repurchase of real estate conveyed by the appellant, Standard Reliance Insurance Company referred to hereafter as the plaintiff, to C. E. Prevey and Medora A. Prevey, husband and wife, as joint tenants, both of whom were deceased at the commencement of this suit. The defendants are the personal representatives, heirs, devisees, and all other persons interested in the estates of the deceased grantees and optionors. The trial court held that the option had not been exercised in accord-

ance with its terms and dismissed plaintiff's petition. The plaintiff has appealed.

The evidence shows that on May 12, 1947, plaintiff entered into a contract with C. E. Prevey and Medora A. Prevey to sell and convey to them certain real estate described in plaintiff's petition. As a part of that contract it was also agreed as follows: "Vendees hereby grant to vendor the right and option within ninety days of the death of both of said vendees to purchase the property herein described for the sum of $9500.00 plus not to exceed $1,000.00 for major repairs, if any, made by vendees during the term of their possession of said property."

The record also shows that plaintiff, on April 30, 1948, executed and delivered a warranty deed to the Preveys in accordance with the provisions of the contract of sale. It is not questioned that the Preveys paid the purchase price agreed upon. The evidence also shows that the Preveys made improvements on the property in excess of $1,000 in value, that the option price was $10,500 thereafter, and that the plaintiff agreed in writing that this was the fact. The warranty deed executed and delivered to the Preveys on April 30, 1948, contained the following provision with reference to the option contained in the contract of sale: "This deed is subject to certain options to repurchase in favor of the grantor, extending for the period of 90 days from and after the death of the survivor of the within named grantees, the said option being conditioned upon the payment of the sum of $10,500. to the grantees, their heirs, personal representatives or assigns."

The evidence shows that C. E. Prevey died on February 13, 1957, leaving surviving his widow, Medora A. Prevey, a number of nieces and nephews, and other more distant relatives. He left a will which devised all of his property to his widow, which was not probated. The defendants Ruth Schoenthal and Joseph V. M. Dennison were contingent devisees of the real estate here

involved under this will. A determination of the inheritance tax due from the estate of C. E. Prevey was made by the county court on April 30, 1957. Plaintiff filed a petition in the county court on June 2, 1959, for the appointment of a special administrator. The defendant Ruth Schoenthal was appointed special administratrix on that date and letters testamentary were issued on June 4, 1959.

Medora A. Prevey died testate on March 17, 1959, and her will was admitted to probate on May 18, 1959. Letters testamentary were issued to Ruth Schoenthal as executrix on May 23, 1959. The time for appeal from the admission of the will of Medora A. Prevey to probate did not expire until after the 90-day period in which the option was required to be exercised. As the surviving joint tenant, Medora A. Prevey was, at the time of her death, the sole owner of the real estate subject to the option. By her will she devised this property to the defendants Ruth Schoenthal and Joseph V. M. Dennison. She also left surviving nieces and nephews who are named as parties defendant in the present suit.

It is evident that the 90 days in which the option was required to be exercised terminated on June 15, 1959. On March 24, 1959, the president of the plaintiff advised Ruth Schoenthal of plaintiff's intention to exercise the option, which letter admittedly was ineffective as an exercise of the option. On June 4, 1959, the president and vice president of the plaintiff, accompanied by one of its attorneys, met with the defendants Ruth Schoenthal and Joseph V. M. Dennison, and their attorney at the latter's office, and tendered the sum of $10,500 in cash as an exercise of the option, which was refused. It is evident from the record that the option was in all respects valid at the time of the death of Medora A. Prevey, the surviving joint tenant. The real issue is whether or not the plaintiff properly exercised its option in accordance with its terms.

The tender of the $10,500 to Ruth Schoenthal and

Joseph V. M. Dennison was properly made if the latter persons were the lawful devisees of the real estate to which the option related. It is the contention of the plaintiff that this question could not be determined with certainty because of the lack of finality in the probate of the estate of Medora A. Prevey. For this reason the tender of the $10,500 on June 4, 1959, was made in writing to Ruth Schoenthal and Joseph V. M. Dennison in the alternative in four different capacities. This was understood by all the parties present. The tender was declined in writing without any reason given therefor. In an affidavit filed in response to a request for an admission Ruth Schoenthal stated that the tender was refused because affiant and Joseph V. M. Dennison would not assume the responsibility and resultant liability in determining the beneficiaries of the tendered sum. In other words, the refusal of the tender was based on the same uncertainties which beset the plaintiff in attempting to exercise its option. The form of the tender was to the effect that plaintiff tendered $10,500 in exchange for the delivery of a good and sufficient deed to the property covered by the option. It will be observed that the tender contained no demands in excess of those required by the option.

On June 4, 1959, the day of the aforesaid tender, plaintiff commenced this suit in the district court for Lancaster County and paid to the clerk of that court the sum of $10,500 to abide the judgment of the court. The uncertainty of the plaintiff as to whom a tender should be made, and the unwillingness of Ruth Schoenthal and Joseph V. M. Dennison to accept the tender because of the uncertainty as to who was entitled to it, is also complicated by the fact that this court has never determined whether the purchase money goes to the heirs or the administrator where an option to purchase is exercised after the death of the one giving the option. An authoritative text sums up the existing situation with respect to this problem as follows: "It

is well settled that an option to purchase land, unless otherwise limited by its terms or by necessary implication therefrom, may be enforced against the heirs, devisees, and representatives of a deceased optionor. Although in case of a general offer to sell the death of the vendor ipso facto withdraws the offer, his death before the expiration of the time for exercising the option does not in any way affect the right of the other party thereafter to make his election and do the things necessary on his part to entitle him to a conveyance. According to the rule in some jurisdictions, the exercise of an option after the optionor's death relates back to the date of the contract giving the option, working an equitable conversion of the vendor's interest in the land into personalty, so that the right to the purchase money passes to the vendor's personal representative and not to his heirs. Other cases, however, take the view that the equitable conversion does not take effect until the option is exercised, and if this is not done until after the vendor's death, the land together with the right to the proceeds passes to the heirs." 55 Am. Jur., Vendor and Purchaser, § 35, p. 504. See, also, 19 Am. Jur., Equitable Conversion, § 16, p. 16. It is not necessary that we determine this question in this litigation. We cite it only to show that uncertainty existed, not only as to whether the heirs or the personal representative were entitled to the fund, but also as to the identity of the persons within the two groups as well. The situation is further complicated by the fact that the $10,500 might possibly be subject to the debts, if any, of Medora A. Prevey and to state and federal inheritance and estate taxes. We think the uncertain situation confronting the plaintiff afforded adequate reason for it to seek the aid of a court of equity as it did. The filing of such a suit for specific performance before expiration of the time limit for exercising the option, accompanied by a tender of the purchase money into court, constitutes an exercise of the option and gives the optionee a right to

specific performance of the option agreement. Asbury v. Cochran, 243 Ala. 281, 9 So. 2d 887; McIntosh v. Hopkins, 255 Mich. 493, 238 N. W. 198; Malone v. Kirkley, 118 Ind. App. 611, 82 N. E. 2d 530. In Asbury v. Cochran, *supra,* the court said: "But while an election to accept and exercise the option is necessary so as to bind the holder of it, and so as to make it mutually binding, the act of filing a bill declaring such acceptance and election is sufficient, since he thereby places himself under all the obligations of the contract." See, also, Smith v. Loewenstein, 50 Ohio St. 346, 34 N. E. 159; Levy v. Congregation Beth Sholom, 181 Misc. 877, 42 N. Y. S. 2d 891.

The petition of the plaintiff alleged the facts as heretofore recited, asserted that the plaintiff hereby does exercise the option to repurchase the real estate and is ready, willing, and able to pay the sum of $10,500 to the person or persons entitled thereto, and alleged that said amount was paid into court at the time of the filing of the petition. The plaintiff further alleged that an adjudication of the rights of the parties is necessary, with which adjudication it is willing to comply. This is clearly a proper exercise of the option in accordance with its terms. The unqualified exercise of the option in accordance with its terms to be determined by the court is a valid exercise of the option since the optionee thereby places himself under all the obligations of the option agreement.

The defendants assert that plaintiff's exercise of the option contained a demand in excess of the requirements of the option agreement and that the attempted exercise of the option was therefore insufficient and of no effect. This is based on the fact that in the prayer of the petition plaintiff prayed that a decree be entered enforcing specific performance of the option contract and directing the defendants, or some of them, to execute and deliver to plaintiff a good and sufficient warranty deed conveying title to the property in ques-

tion. This court has held that a demand for a warranty deed contrary to the terms of the option agreement is not an acceptance, but is a counter-proposition. Master Laboratories, Inc. v. Chesnut, 154 Neb. 749, 49 N. W. 2d 693; Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140, 3 A. L. R. 2d 250. It is fundamental in this state that the prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are established by the evidence the court will grant the proper relief, although it may not conform to the relief prayed for. Johnson v. Ruhl, 162 Neb. 330, 75 N. W. 2d 717; Central Nebraska Public Power & Irr. Dist. v. Walston, 140 Neb. 190, 299 N. W. 609; Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N. W. 174. This court has held that a petition containing a prayer for general relief, in addition to a prayer for specific relief as in the case before us, entitles the litigant to all the relief the proof shows that he is entitled to receive. Johnson v. Radio Station WOW, on rehearing, 144 Neb. 432, 14 N. W. 2d 666. In School Dist. No. 70 v. Wood, 144 Neb. 241, 13 N. W. 2d 153, we said: "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." The prayer for general relief is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence. Kelley v. Wehn, 63 Neb. 410, 88 N. W. 682. The prayer is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. Jordan v. Jackson, 76 Neb. 15, 106 N. W. 999.

Under the foregoing authorities the prayer of the petition is no part of the stated cause of action. The fact that the pleader in an equity suit may have prayed for less or more than that to which he is entitled, when the prayer asks for general equitable relief, in no manner affects the stated cause of action. The controlling facts are those alleged in the petition as a cause of

action. The prayer is merely a request based on the alleged facts which the court in the consideration of the allegations and proof may or may not grant. It is a request directed to the court based on the facts alleged, not a demand upon the defendants in the sense that it could defeat the cause of action. We necessarily hold that the pleaded facts and not the prayer determine whether or not the plaintiff in the instant case properly exercised the option to repurchase the real estate in question.

The plaintiff made no demand for a warranty deed in the cause of action set out in the body of its petition. The petition therefore constituted an unqualified acceptance and exercise of the option agreement.

There is evidence in the case that, after the option agreement was entered into and prior to the time that the option was required to be exercised, the city of Lincoln levied special assessments for a public improvement against the real estate subject to the option, payable over a period of 10 years. It is shown that the installments due prior to the exercise of the option were paid and those falling due thereafter remained unpaid. It is the contention of the defendants that plaintiff's exercise of the option was insufficient in that it did not offer to pay nor assume the payment of these installments which were a lien on the property. There is no merit to this contention. The allegations of the petition that plaintiff hereby exercises the option and agrees to pay any amount found due the defendants under the terms of the option as determined by the court constitutes a complete exercise of the option and an unconditional tender of performance.

Defendants also contend that plaintiff is guilty of laches sufficient to bar a recovery in that it failed to bring the action for a period of 10 years after the option agreement was entered into. This contention is likewise without merit. It seems plain to us that plaintiff could not exercise its option by appealing to the equit-

able jurisdiction of a court of chancery until after the death of the surviving joint tenant. Plaintiff could have no standing in court on the issues presented in such a suit prior to that time. The rule is: Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose.

For the reasons stated the trial court was in error in dismissing plaintiff's petition. The judgment of the district court is reversed and the cause remanded with directions to determine the rights of the parties under the option agreement in accordance with our holding herein, to determine the amount owing by the plaintiff thereunder, and to direct the full amount thereof to be paid into court; that when so paid the decree of the court operate as a transfer of the real estate described in the option agreement to the plaintiff; and that the court thereafter determine the parties entitled to the fund paid into court and order distribution thereof in accordance with such determination. The costs of the appeal are taxed to the defendants Ruth Schoenthal and Joseph V. M. Dennison.

REVERSED AND REMANDED WITH DIRECTIONS.

HARRY GRAVES, APPELLEE, V. RICHARD J. BEDNAR, APPPELLANT.
107 N. W. 2d 12

Filed December 23, 1960. No. 34781.

1. **New Trial.** A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied.

A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

2. ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
3. ———. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
4. **Trial.** In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
5. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
6. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its findings based on conflicting evidence will not be disturbed unless clearly wrong.
7. **Trial: Appeal and Error.** In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it.
8. **Negligence.** Negligence is a question of fact and may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.
9. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
10. ———: ———. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.
11. **Trial.** The reading by the official reporter of the testimony of a witness examined on the trial is within the spirit if not within the letter of section 25-1116, R. R. S. 1943, since the stenographic reporter's notes of the testimony are liable to be more

accurate than the judge's recollection of what was testified to.

12. ———. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded with directions.*

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellant.

Theodore L. Kowalski and *Wear, Boland, Mullin & Walsh,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Harry Graves, brought this action against defendant, Richard J. Bednar, seeking recovery of damages for personal injuries, hospital and medical expenses, and damages to his motorcycle alleged to have been proximately caused by specified negligence of defendant when his car and plaintiff's motorcycle collided at what is shown by the evidence to be the intersection of Dodge Street, herein called Dodge, and Happy Hollow Boulevard, herein called the Boulevard, in Omaha.

Defendant's answer denied that he was guilty of any negligence, and alleged that any injuries or damages suffered by plaintiff were the direct and proximate result of plaintiff's own specified negligence which caused or contributed to the accident. Defendant's prayer was for dismissal of plaintiff's action. Plaintiff's reply was in the nature of a general denial.

Upon trial to a jury, the parties each adduced evidence, and defendant's motion for directed verdict, together with plaintiff's motions to not submit the issue of plaintiff's alleged contributory negligence to the jury and to instruct that defendant was guilty of negligence

as a matter of law, and submit only the issue of damages, were overruled. Thereupon, the issues of negligence and contributory negligence were submitted to the jury and it returned a verdict for defendant. A judgment was rendered accordingly for defendant, and thereafter the court sustained plaintiff's motion for new trial and granted a new trial. Thereafter, defendant appealed, assigning and arguing that the trial court erred in granting a new trial because no error prejudicial to plaintiff occurred in the trial, and the record showed no legal reason for granting a new trial. We sustain defendant's assignment.

On the other hand, plaintiff's brief contended that the trial court properly granted a new trial for reasons, to wit: (1) That instruction No. 8 given by the court was erroneous because it improperly and incompletely advised the jury with relation to the duty of a left-turning driver in a heavily traveled intersection protected by traffic lights; (2) that for want of sufficient evidence, the court erred in submitting the issue of plaintiff's alleged contributory negligence to the jury; (3) that the court erred in submitting the issue of defendant's alleged negligence to the jury because the evidence disclosed that he was guilty of negligence as a matter of law; and (4) that the jury misinterpreted its duties and engaged in conjecture, speculation, and misconduct in reaching its verdict which denied plaintiff a fair and impartial trial. We do not sustain plaintiff's contention.

There are well-established, applicable rules of law which are controlling in cases such as that at bar. In that connection, as recently as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579, we reaffirmed that: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

"Errors sufficient to cause the granting of a new trial

must be errors prejudicial to the rights of the unsuccessful party.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

In Owen v. Moore, 166 Neb. 239, 88 N. W. 2d 768, we held: "In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury."

In Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, we held: "It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.

"It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong."

In Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293, we held: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it."

In Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820, we held: "Negligence is a question of fact and may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

"One having the right-of-way may not on that account proceed with disregard of the surrounding circum-

stances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents."

In Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854, we held: "A 'go' signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated.

"A motor vehicle having started to cross an intersecting street in accordance with the signal light is ordinarily entitled to complete the crossing notwithstanding a change in lights.

"A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection."

In Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, we held: "All travelers are required to exercise due care in coming to and crossing an intersection of public highways."

In Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, we held: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.

"Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless

this is done, the judgment will not ordinarily be reversed for such defects."

As held in Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913: "The meaning of an instruction, not the phraseology, is the important consideration, and prejudice will not be found when the meaning thereof is reasonably clear.

"Instructions should be considered as a whole, and if they fairly submit the case the verdict of the jury will not be set aside."

In Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551, we held: "Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misleading or confusing."

In the light of such rules and others hereinafter cited, we have searched the record and examined the trial court's instructions. As far as important here, we summarize the relevant and material evidence as follows: Dodge is a brick-paved street, 42-feet wide, and has four marked lanes of travel, with two on the south for eastbound traffic and two on the north for westbound traffic. Dodge is intersected by the Boulevard in a channelized and oblongated east and west manner about four blocks west of Fifty-second Street, from which point there is a downgrade of about 3 or 4 percent to such intersection, and an upgrade therefrom toward the west. The Boulevard runs northeasterly from Dodge and has two separately-divided but merging 30-foot paved streets, with one on the east and one on the west, separated by a 92.2-foot triangular island extending east and west along the north curb on Dodge and on to the north point of merging in the Boulevard. At the time in question, such 30-foot streets were each respectively used for entry to and exit from the Boulevard. There were

four operating traffic lights at the intersection. One was located at the southwest corner of the island on the north side of Dodge and at the east side of the west 30-foot street; one was located directly west across such street and on the north side of Dodge; one was located a short distance west of midway across from the island on the south side of Dodge; and one was located some distance west thereof, on the south side of Dodge.

A few moments before 8 a. m. on October 6, 1953, plaintiff was riding his motorcycle west in the outer or north traffic lane on Dodge down the slope from Fifty-second Street to the intersection and to the point of accident in the intersection. He was due at work near Seventy-second Street at 8 a. m., but claims that he was traveling at only 20 to 25 miles an hour, although there is evidence that his speed was from 25 to 30 miles an hour. No vehicles were ahead of plaintiff in his lane of travel. Several cars traveling west on the inner lane of Dodge and to plaintiff's left were slowing down or stopping for red traffic lights, which cars somewhat obstructed plaintiff's view of the intersection, and he testified that as he passed said cars he looked but did not see defendant's car turning left in the intersection until about 15 to 18 feet before colliding with it. In the meantime, the head car traveling west on the inner lane of Dodge had stopped for red traffic lights. The driver of such vehicle, known as the Carter car, turned on his car blinker lights for a left turn south, and when green signal lights appeared, he moved up a few feet and stopped again to permit defendant and eastbound traffic on his left to clear the intersection. Plaintiff testified that he first saw defendant's car as it came across to the north in front of the Carter car without stopping or changing its direction, and plaintiff then applied his brakes and turned left, but was unable to avoid collision.

On the other hand, defendant was due to attend a law class at Creighton University, at 8 a. m., and he

testified that after driving his car east on the inner traffic lane of Dodge, he stopped for red traffic lights and turned on his car blinker lights for a left turn north. Thereafter, he looked east up the slope, and seeing no traffic in the north lane of Dodge, he followed the green traffic lights left at about 5 to 8 miles an hour, which speed is undisputed, across the intersection of Dodge and beyond the center thereof toward the east lane of the west 30-foot street entrance to the Boulevard. In doing so, he turned left a few feet west of the Carter car which had stopped and indicated its intention to turn left toward the south. Such car temporarily obstructed defendant's view to the east, and defendant claimed that he looked but did not see or hear plaintiff's motorcycle until just before the collision. There is evidence that the accident occurred in the east traffic lane extending northeast toward the Boulevard, and the north outer traffic lane of Dodge in the intersection where the front of plaintiff's motorcycle and the right rear fender and wheel of defendant's car collided, and the side of plaintiff's motorcycle slid around into the right side of defendant's car. Defendant testified that the front of his car was beyond the north traffic lane of Dodge when the accident occurred, and that in the afternoon, after the accident, he visited with plaintiff at the hospital where plaintiff said that he wasn't sure how the accident happened but that he saw defendant indicating that he was going to make a left turn, but plaintiff thought that without slowing down his motorcycle defendant would be out of the intersection before plaintiff's machine got there. Another witness for defendant testified that he was with defendant when plaintiff and defendant talked about the accident, but such witness could not recall just what the conversation was. In that connection, plaintiff testified that he had no recollection of defendant's visit at the hospital or the making of any such statements to defendant. Concededly, neither party sounded his horn before the accident.

Instruction No. 1, given by the trial court, summarized and paraphrased all of the material allegations of plaintiff's petition, and no complaint thereof as such is made by plaintiff. That instruction stated in substance plaintiff's allegations that on October 6, 1953, he was proceeding west on Dodge while operating a motorcycle, when defendant, driving a car east on Dodge, turned left across the intersection of Dodge with the Boulevard and directly in front of plaintiff's motorcycle, causing a collision. Plaintiff's theory of recovery and his claimed negligence of defendant, which was alleged to have proximately caused the accident and plaintiff's injuries and damages, was set forth fully and at length in seven separate enumerated paragraphs of the instruction. To recite them herein at length would serve no useful purpose.

Instruction No. 2, given by the trial court, summarized and paraphrased the material allegations of defendant's answer, and no complaint thereof as such is made by plaintiff. It stated in substance that defendant admitted plaintiff was operating a motorcycle and defendant was operating a car at such time and place; that Dodge runs east and west and is intersected by the Boulevard which crosses Dodge; and that such intersection was protected by operating traffic lights on the morning of the accident. Defendant alleged that he had come from the west on Dodge in the inner lane, next to the center, intending to turn north on the Boulevard; that as he came to the intersection, the traffic lights were red against him, and he stopped, headed east in the inner lane; that he then turned on his car blinker lights indicating his intention of turning left to the north; that on the east side of such intersection there were a number of cars headed west in the inner lane next to the center of Dodge, which were likewise stopped by the red traffic lights against them; that the westernmost car in such lane had its blinker lights on, indicating its intention to make a left turn to the south; that when the traffic

lights turned green, defendant moved ahead and turned left to go north; that the car opposite defendant from the east moved ahead, then paused to allow defendant to proceed north; and that having passed the inner lane of westbound traffic on Dodge and almost through the outer lane going north into the Boulevard, plaintiff ran into the side of defendant's car. Defendant then denied all allegations of plaintiff's petition not admitted, and denied that he was guilty of any negligence, but alleged that any injuries and damages suffered by plaintiff were the proximate result of plaintiff's own negligence which caused or contributed to the accident. In that connection, defendant's claimed negligence of plaintiff, which was alleged to have proximately caused the accident and plaintiff's injuries and damages, was set forth fully and at length in five separate enumerated paragraphs of the instruction. To recite them herein would serve no useful purpose.

The evidence adduced by the parties is too voluminous to set forth at length here in more detail than we have already done. We deem it sufficient to say that there was competent evidence respectively adduced by the parties sufficient to support the allegations of plaintiff's petition and defendant's answer heretofore mentioned, and that the evidence was either conflicting in material respects or was such that reasonable minds could draw different conclusions or inferences therefrom with regard to the respective allegations of negligence and contributory negligence which required the submission of such issues to the jury, as was properly done by the trial court. We therefore do not conclude, as a matter of law, that plaintiff was guilty of contributory negligence more than slight as argued by defendant, or that defendant was guilty of negligence as a matter of law, as argued by plaintiff.

With regard to instructions given, plaintiff simply contended that the trial court erred in giving instruction No. 8 for reasons heretofore recited, which allegedly

justified the granting of a new trial. We do not agree that such instruction was erroneous as claimed by plaintiff, who offered no requests for instructions, and in his brief admits that instruction No. 8 was "correct as far" as it went, but that it was "not complete." In that connection, instruction No. 8 simply advised the jury at length and properly with regard to the applicable provisions of ordinances of the city of Omaha received in evidence, and the applicable statutes of this state. Such instruction is too verbose to recite here at length. It is sufficient to say that it fully and fairly advised the jury with respect to the material applicable ordinances and statutory duties therein required of every motorist who operates a motor vehicle on the streets and highways of the city of Omaha and this state, and included in said instruction were all of the material and applicable limitations and qualifications contained in said ordinances and statutes. Of course, under the circumstances presented herein, such instruction did not include and was not required to include all the law of the case, because, as heretofore pointed out, all instructions given are required to be considered in determining whether instruction No. 8 was erroneous as claimed by plaintiff.

As heretofore pointed out, instruction No. 1 advised the jury at length the manner in which plaintiff claimed defendant was negligent, and instruction No. 2 advised the jury at length the manner in which defendant claimed plaintiff was negligent. Instruction No. 4 properly placed the burden of proof upon plaintiff with respect to defendant's alleged negligence, and instruction No. 5 properly placed the qualified burden of proof upon defendant with respect to plaintiff's alleged negligence. Instruction No. 7 advised the jury that both parties were required to see what was in plain sight, and that the fact that either one may not have seen the other if, in the exercise of ordinary care under the circumstances the other could have been seen, would

not excuse such driver from fault in not having seen the other. Instruction No. 9 informed the jury that a green light was not a command to go, but gave permission to proceed if, in the exercise of ordinary care, under all the particular circumstances and surroundings, an ordinarily prudent man exercising ordinary care would feel secure in doing so. Instruction No. 10 advised the jury that: "The statute giving to defendant the right-of-way after giving a lawful signal for a left turn and permitting defendant to proceed is subject to the condition that an ordinary prudent man exercising ordinary care would so proceed. To determine whether defendant under the conditions exercised ordinary care you should consider that after making the turn he was then facing a red light; what the plaintiff could reasonably expect in the way of intersecting travel on a highway of the character of Dodge Street at the place of the accident, and all other facts and circumstances in evidence." Instruction No. 11 advised the jury that: "In determining whether or not either driver exercised ordinary care under the circumstances there should be considered; the character of the road, the traffic thereon, the fact that it was a four-lane highway, that it was of an interstate character and heavily traveled, and what an ordinary prudent man exercising that degree of care would have done, and all other facts and circumstances in evidence."

No complaint is made here of any instructions as such except No. 8, and we conclude that the aforesaid instructions, including instruction No. 8, were in no manner prejudicially erroneous, but were in fact all-inclusive of the very theory upon which plaintiff sought recovery.

We turn finally to plaintiff's contention that a new trial was justified for misconduct of the jury in reaching a verdict by conjecture and speculation. We do not agree. That contention arose out of the fact that after

the jury had retired to deliberate, it submitted a written request to the court as follows: "To Judge Thomsen. Testimony of Graves. Did Graves see Bednars car before he entered the intersection and figure he had enough time without reducing his speed for Bednar to complete his turn."

In that connection, after receipt of such request, the official court reporter read to the court, and the court decided, what portions of Graves' testimony he believed to be in point. Thereafter, counsel for the parties, as requested by the court, returned to the courtroom where, in absence of the jury, counsel for defendant requested the court to include in the testimony to be read to the jury the portion of defendant's testimony relating to plaintiff's conversation with defendant at the hospital the afternoon following the accident, which we have heretofore pointed out and which could have affirmatively assisted the jury in answering its request. Upon objection thereto by plaintiff's counsel, defendant's request was denied, and the court said: "I will have the reporter read the testimony of Mr. Graves both on direct examination and cross examination on this point." Thereupon, the jury returned to the courtroom and, as directed by the court, the court reporter read the testimony of plaintiff given "both on direct examination and cross examination upon this question," which had theretofore been submitted by the jury. With regard thereto, the record discloses that plaintiff's counsel never objected to the proposed reading of plaintiff's testimony, or to the portions thereof which were read. As a matter of fact, after such testimony had been read, plaintiff's counsel suggested, in order to have no misunderstanding, that if defendant's counsel desired a reading to the jury of any other portions of plaintiff's testimony after checking the same with the court reporter, he, plaintiff's counsel, would have no objection to doing so, even "out of my presence if he feels he overlooked anything." Other portions of plaintiff's tes-

timony were not read, and the jury retired again for deliberation, as directed by the court.

In such respect, we conclude that the trial court complied with section 25-1116, R. R. S. 1943, in every material manner, and did so as requested by plaintiff's counsel, without any error prejudicial to plaintiff.

In Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407, this court held: "The reading by the official reporter of the testimony of a witness examined on the trial is certainly within the spirit if not within the letter of section 25-1116, R. R. S. 1943, since the stenographic reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to."

As held in Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352: "Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial." We decide that plaintiff's contention with regard to claimed misconduct of the jury in arriving at its verdict has no merit.

We conclude that the trial court erred in sustaining plaintiff's motion for new trial and in the granting of a new trial, and that the order so doing should be and hereby is reversed and the cause is remanded with directions to reinstate the verdict of the jury and the judgment rendered thereon in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

OSBORNE TURNELL ET AL., APPELLANTS, V. MABEL C. MAHLIN ET AL., APPELLEES.
106 N. W. 2d 693

Filed December 23, 1960. No. 34836.

1. **Appeal and Error.** The Revised Rules of the Supreme Court

provide that assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

2. Waters. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.
3. ———. Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another.
4. ———. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors.
5. Negligence. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
6. Injunction. Injunction is the appropriate remedy for the protection of plaintiffs' rights herein.
7. Damages. The rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages relating to the loss of crops and damage to land will not be allowed.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Blackledge & Sidner, for appellants.

Tye, Worlock & Knapp, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district

court for Buffalo County by Osborne Turnell, Ethel Turnell, Blanche Snider, and Bruno Miller, plaintiffs, against Mabel C. Mahlin, Milton Webb, and Wayne Webb, defendants. The purpose of the action was to restrain and permanently enjoin the defendants and each of them from diverting, interfering with, and obstructing the natural drainage of surface waters, and from causing the same to be diverted onto the lands of the plaintiffs; to require the defendants to refill the ditches and remove the dikes and dams so that the area here involved might be restored to its original state as provided by nature; and to recover from the defendants and each of them damages caused by the defendants' negligence in diverting surface waters onto the lands of the plaintiffs.

The defendants, by cross-petition, sought to restrain and permanently enjoin the plaintiffs and each of them from diverting, interfering with, and obstructing the natural drainage and surface waters along and across the defendants' lands; to require the plaintiffs to remove all filling, leveling, dikes, and dams constructed by the plaintiffs; to require the plaintiffs to open up and restore the natural drainage courses across their lands to their natural state; and to recover damages caused by the plaintiffs' negligence in diverting the natural drainage of surface waters so that the same ran onto the defendants' lands to the defendants' damage.

The trial court found generally for defendants and against the plaintiffs on the plaintiffs' petition; that the plaintiffs should be denied an injunction as prayed for in their petition, and denied damages; and that the defendants should be denied the relief prayed for in their cross-petition. Judgment was rendered in accordance with the findings.

The plaintiff filed a motion for new trial, or in the alternative to set aside the judgment rendered by the trial court. The trial court overruled the plaintiffs' motion mentioned above, and the plaintiffs perfected appeal to this court.

The plaintiffs assign as error that the trial court erred in dismissing the plaintiffs' petition, and erred in overruling the plaintiffs' motion for new trial, and alternative motion for a finding and decree in favor of the plaintiffs.

The trial court made a finding as follows: "This order shall not be construed as relieving parties herein from negligent or unlawful operation of their future drainage problems." The above finding does not appear in the trial court's journal entry, to which omission the plaintiffs objected, and in support of such objection offered into the record the docket notes of the trial court covering the trial and the decree, which were received in evidence.

The Revised Rules of the Supreme Court of this state, 1960, rule 8a2(4), provides: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned."

The plaintiffs failed to comply with the rule above set forth in their assignments of error relating to the sufficiency of the journal entry to fully describe the judgment rendered.

We find no merit to the plaintiffs' contention as above set forth.

Osborne Turnell and Ethel Turnell, husband and wife, are the owners of the northeast quarter of Section 32, Township 9 North, Range 17, in Buffalo County. Blanche Snider is the owner of the southwest quarter of Section 28, Township 9 North, Range 17, and Bruno Miller is the tenant farming the Snider land. Mabel C. Mahlin is the owner of the northwest quarter of Section 33, in Township 9 North, Range 17. It is alleged that Milton and Wayne Webb are the tenants in possession of the Mahlin land. The land of the Turnells is situated im-

mediately west of the land of Mabel C. Mahlin, divided by a section line, north and south graveled road. The Snider land is situated immediately to the north of the Mabel C. Mahlin land, separated by a graveled, maintained county road running east and west. Immediately north of the Turnell land is what is known as the Oldfather land. This land is west of the Snider land, divided by the north-south road heretofore mentioned. The lands of the plaintiffs and defendants are cultivated, irrigated, and productive.

There is no dispute by the parties in this case. What we are concerned with on this appeal are surface waters only.

For convenience we will refer to Osborne Turnell as Turnell, and to his land as the Turnell land or plaintiffs' land; to Mabel C. Mahlin as Mahlin, and to her land as the Mahlin land or defendants' land; to Bruno Miller as Miller; to Blanche Snider as Snider, and to her land as the Snider land; and to other witnesses either by their first or last names, or to the lands owned by them as occasion requires.

Before summarizing the evidence, we set forth some well-established rules relating to this appeal.

Actions in equity, on appeal to this court, are triable de novo.

"Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters." Schomberg v. Kuther, 153 Neb. 413, 45 N. W. 2d 129. See, also, Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542.

"Surface water is a common enemy and the proprietor may by embankment or dike or otherwise defend himself against its encroachments and will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercised

ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another." County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N. W. 2d 507.

"Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors." Bussell v. McClellan, 155 Neb. 875, 54 N. W. 2d 81.

Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.

Many cases, too numerous to cite, declare that injunction is the appropriate remedy for the protection of the plaintiffs' rights in a case such as the case at bar.

Miller testified that he was a tenant farming the Snider land; that he lived right north of the Snider land; that he was 50 years of age and had lived in the area here involved all his life; and that he farmed the Mahlin land from 1929 to 1934. He further testified that the general direction of the drainage in that area is south and east; that the waters run into the Kearney Canal at the south end of the Turnell land and continue 8 or 10 miles into the Kearney Lake; that there is a high spot on the Snider land extending into the Mahlin land running generally from north to south and close to the west side of both the Snider and Mahlin lands; that this ridge is elevated above the surface of the surrounding land; that the natural flow of the surface waters across the Snider land is from the northwest to the southeast, and east of the high spot or ridge on the Snider and Mahlin lands; that the surface waters proceed across the east-west road from the Snider land onto the Mahlin land through a 16-inch culvert under the road, which

is the only culvert in that area; that the surface waters then proceed south onto the Mahlin land and into a duck pond or lagoon of approximately 15 acres in the northeast corner of the Mahlin land; that this was the course of the surface water in its primitive state; that the waters would not flow west because of the ridge running north and south on the Snider and Mahlin lands, but would run east; that this ridge is 565 feet from the northwest corner of the Mahlin land; and that there never has been any drainage by nature from the east to the west across this ridge because water will not run up hill and it would have to do that in order to get over the ridge. This witness further testified that there has been some construction work along the north side of the Mahlin land consisting of a dirt dike, the dirt being taken out of the road ditch to build up the dike and the road ditch north of the Mahlin land deepened on the east-west road, and the dirt was piled up on the bank on the Mahlin land; and that most of the dike is across the east half of the north line of the Mahlin land. He further testified that the road ditch extends clear across the north portion of the Mahlin land and has been deepened the entire distance; that, figuring from the bottom of the deepened road ditch to the top of the dike, it is higher in the low spot about 488 or 500 feet from the east side of the north line of the Mahlin land; that the dike is not as high going to the west; and that in the particular area just described, the dike is about 4 feet high, considering the depth of the road ditch, and is at its greatest height at the low part of the land. This witness further testified that he talked to Wayne Webb, the tenant on the Mahlin land, with reference to the construction, and informed him that it would back up the water on the Snider land after every rain; that before the dike was built the water would back up onto the Snider land perhaps an acre or so; and that now it would back up to the extent of 10 acres, or as far as 60 rods north and probably 10 rods or more wide, and would

be a foot or more deep. The effect of the backing up of this water onto the Snider land would be to ruin the crops and the land. He further testified that since the road ditch was deepened and the dike built on the Mahlin land, the water that would ordinarily proceed south onto the Mahlin land is turned to the west onto the Turnell land; that in all the years that this witness had known the land and watched the drainage, there had never been times, before the dike was built and the ditch deepened, that he had seen water running across the north-south road, but ever since the dike was built and the ditch deepened, he believed he had seen water running across the road onto the Turnell land about every year; and that there is a large quantity of water that reaches the Turnell land and floods it.

On cross-examination this witness testified that there is a culvert across the north-south road between the Mahlin and Turnell lands south of the intersection which water flowed through from the east to the west prior to and subsequent to the construction made on the Mahlin land; that this culvert is 973 feet south of the northwest corner of the Mahlin land; that before the road was leveled, some of the water, after it crossed the road, ran a little bit to the west and then south; that some of the water that ran across the Mahlin land on the east side of the ridge would turn to the southwest at the south end of the ridge and run southwest into the Kearney Canal; that the water taken out of the lateral or dike is used for irrigation purposes on the Mahlin land; that across the Turnell land there is very definite drainage over about halfway east and west, running south across the Turnell quarter section of land; and that Turnell has done some leveling and improving of his land along the north and east sides of it.

J. M. Halliwell testified that he lives immediately east of the Snider land and cornering the Mahlin land, has lived in that area for over 70 years, and had farmed the Mahlin land in 1915; that he has lived on the land

he now occupies for 32 years and is familiar with the course of rainwaters as they flow across his place; that the drainage across the Snider land is from the northwest to the southeast, and across the east-west road between the Snider and Mahlin lands and south to the Kearney Canal; that before the dike was built and the road ditch deepened along the north side of the Mahlin land, none of these waters would back up across the Snider land or proceed west to the Turnell land for the reason that the waters could not get over the raise on the Mahlin land; that because of the dike constructed on the Mahlin land some of the waters backed up on the Snider land and stood there for 60 hours; and that the amount of water standing on the Snider land would result in damage to the crops growing thereon and would have some effect on the soil.

On cross-examination this witness testified that at all times, on the land in that area, there were some low spots, and the drainage was not too good on such lands; that nearly every farm below the hills has been improved by irrigation which has changed a lot of things insofar as the water flowing on such land is concerned; and that there is an opening into the Kearney Canal at the south end of the Turnell land. He described the natural flow of surface water in its primitive condition on the Mahlin land as the previous witness described it.

Ernie Asay testified that he was a former highway commissioner for Buffalo County, had occupied such position for 17 years, and had been employed by the highway department of that county for 38 years. He further testified that he was familiar with the lands here involved and the location of the Kearney Canal immediately south of these lands; that he was familiar with the Mahlin land before there was any leveling of such land and before the dike was built thereon; that on the Mahlin quarter section there was a lagoon in the northeast 40 acres of such quarter section and to the west of this lagoon was reasonably high ground; that

over the years, by his observation, relating to the flow and drainage of rainwater generally in its primitive condition on the Mahlin land, the lagoon would hold a considerable amount of water but in heavy rains water would overflow to the south and into the Kearney Canal; that in 1957, immediately after a heavy rain, this witness was in the vicinity of these lands on the north-south road that goes along the east side of the Turnell land, and also along the east-west road that runs on the north side of the Mahlin land; that at that time he saw considerable water crossing the highway east to west onto the Turnell land; and that this water was coming from the south ditch of the east-west road along the north side of the Mahlin land. This witness further testified that during the many times he had seen the land prior to the construction made on the Mahlin land, he had never seen water run from the east to the west on the north side of the Mahlin land because the water could not get over the ridge on the Mahlin land; and that before the deepening of the ditch and building of the dike on the Mahlin land, to his knowledge, there had been no impounding of water north of the east-west road.

Allen A. Wright testified that he had lived in Buffalo County for 65 years and had been familiar with the lands of the various parties involved in this litigation from 1904 until 1920; that he lived on the Turnell land for 12 years and farmed it following that time for 4 years; and that he had many opportunities to observe the course of rainwaters as they drained across these lands. He substantially corroborated the testimony of the foregoing witnesses with reference to the natural drainage of waters on these lands, and also located a lagoon on the Mahlin land, as did the previous witnesses. He testified that the size of this lagoon was probably 9 or 10 acres; and that at no time, since he has known these lands, did water cross the north-south road and flood the Turnell land.

Ethel Turnell, the wife of Osborne Turnell, testified

substantially to the drainage of the surface waters in that area, with which she was familiar and acquainted all of her life, as did the previous witnesses. She further testified that since the deepening of the ditch and the building of the dike on the north side of the Mahlin land, the rainwater now floods across the north-south road from the east; and that prior to the construction work done on the Mahlin land these waters never flooded in that direction.

Osborne Turnell testified that he was 62 years of age and had known the land in that area all of his life and under all kinds of weather conditions; that he observed the pattern and flow of the rainwaters and floodwaters across these lands; that the general course of such waters across the Snider land was to the southeast, leaving that land close to the southeast corner of such land and across the east-west road into the lagoon in the northeast quarter of the Mahlin land; that the water would flow south and southeast toward the opening in the Kearney Canal; that before the road ditch was deepened on the south side of the east-west road and before the dike was built none of the rain or floodwaters would flow to the west because the land was higher, indicating, of course, the ridge on the Mahlin land; and that water would not run up hill. This witness further testified to the source of his problem, that is, as to where he received the water about which he complains, by the construction of the dike and the deepening of the ditch on the north side of the Mahlin land; that the water is concentrated on the northeast corner of his land for a distance of 688 feet south from a point 643 feet south of the extreme northeast corner of his land; that the water causing the trouble comes from the east on the north side of the Mahlin land to the northwest corner of the Turnell land and then turns south; that such waters are released from the deepened road ditch at the northwest corner of the Mahlin land and then back across the north-south road into his field for

a distance of 688 feet; that at that point the waters really pour across into his land; and that before the ditch was deepened and the dike built on the Mahlin land he never received any water from the east running across the road in a westerly direction to the area of his trouble spot.

On cross-examination this witness testified that the construction of the dike on the Mahlin land has not changed the picture in the northwest portion of the Mahlin land; that the level of the road on the east half of the Mahlin land is lower than the dike on the Mahlin land and east of the culvert the dike is higher than the road; and that the level of the dike is higher than the culvert. This witness further testified that in October 1951, he leveled the area on the east side of the natural watercourse on his land, that is, east of the private road on his land.

Harry Neal testified in behalf of the defendants. He testified that he had lived 4 miles north of Elm Creek, and in Buffalo County for 61 years; and that he is familiar with the lands involved in this litigation. He described the pattern of the flowage of rainwater as follows: That the water came off the Oldfather land at the northwest corner of the Snider land, and south to the north half of the Mahlin land and from there into a lagoon on the Mahlin land; and when the lagoon was filled with water it would flow in a southwesterly direction, making a horseshoe turn on the Turnell land and back toward the road. He was not sure where this water crossed the road, but it did flow on the west side of the road into the Kearney Canal. He further testified that there was a lagoon on the north side of the east-west road, constituting an acre or an acre and a half.

Milton Webb testified that he was not the tenant on the Mahlin land and had no agreement, either oral or written, with reference to such land; and that he exchanged work back and forth with his son Wayne who was the tenant on the Mahlin land. He further testified

that he was familiar in some degree with the pattern and flow of the surface and rainwater on and across the lands involved in this litigation; that the drainage from the northwest of the Mahlin land runs down the north-south road between the Mahlin and Turnell lands to the Kearney Canal; that when the water crosses the Oldfather land onto the Snider land, some of the water would run onto the west side of the north-south road to the Kearney Canal; that Turnell has constructed a small dike on the west side of the north-south road on his land which turns a large amount of water across the road which, it is claimed, had the effect of preventing water running through the culvert from the Mahlin land onto the Turnell land; that he farmed the Turnell land in 1941; and that at the four corners of the intersection of the Oldfather, Snider, Turnell, and Mahlin lands the water that ran down the north-south road would flood at the intersection frequently before any work was done on the Mahlin land. He further testified that the construction of the dike and the deepening of the ditch on the Mahlin land started in 1946 and was finished in 1948; that the dike is a dirt dike used as a lateral; that the height of the dike in comparison with the height of the road separating the Snider and Mahlin lands is level with the road on the east third of the Mahlin land, and west to the irrigation pump on the Mahlin land it is three-tenths of a foot higher than the road; that if the debris was kept out of the ditch on the south side of the Snider land there would be no difficulty in water backing up onto the Snider land; that if a hole was made in the dike on the Mahlin land this would cause the water to run south onto the Knobel land which is immediately south of the Mahlin land, where the water never ran before; that there was no change in the course of the water prior to and subsequent to the construction built on the Mahlin land; that the ditch running north and south on the north-south road causes the water on the south side of the

Mahlin land to run south where it connects with other water and such water then proceeds west across the Turnell land from the Mahlin land; that the Turnell land flooded from the north and northwest before the construction was made on the Mahlin land; and that he has never seen the ditches overflow since the construction was made on the Mahlin land.

On cross-examination this witness testified that he knew about the work that was to be done on the Mahlin land from Mr. Mahlin, but he was not farming the Mahlin land; and that he presumed that his son Wayne would know about it. He further testified that when you get to the west end of the Mahlin land toward the ridge, a dike is not needed because of the natural elevation, but that the ditch was deepened at that point for the purpose of causing the water to flow westward, and this had to be done to get the water over the raise; that the low spot on the Mahlin land is next to the pump house and at that point the dike is practically level with the road; that the dike was elevated some at that point; that the purpose of the dike was to stop the drainage of waters across the road onto the Mahlin land and also, by extending the ditch westward, would cause the waters to flow to the west where they had not heretofore naturally flowed; that the dike was elevated somewhat above the road; that by extending the ditch westerly and deepening it, the waters that would have gone south onto the Mahlin land went west by virtue of the ditch and the dike, and that was the object for which the dike was built and the ditch deepened; and that the result is that the waters in their original or primitive state that came south across the road onto the Mahlin land and in a southwesterly direction, instead of that those waters are now taken westerly into the road ditch on the south side of the east-west road then south along the east side of the north-south road.

Milo Faser testified that he was 73 years old, had lived in Buffalo County 58 years, and was familiar with

the land involved in this case. He further testified that before the construction on the Mahlin land he had seen the Turnell land flooded in the southeast corner thereof; that he also knew of the work that was done on the Turnell property where the water crosses the road from the Mahlin land; that there was a pretty deep swale there which Turnell filled up and leveled off so that his land could be irrigated, otherwise the water would drain off the Mahlin land to the southwest onto the Turnell land; that the low spot on the Snider land is the same as it has been since 1904; that there has always been a swale there consisting of 3 or 4 acres; and that the ditch or borrow pit on the north side of the east-west road between the Mahlin and Snider lands is filled up. This witness also testified that prior to the time work was done on the Mahlin property he had seen water flooding the southeast corner of the Turnell land.

Wayne Webb testified that he has rented the Mahlin land since 1942; that his father had not rented this land; that he is now the tenant occupying such land; that the drainage of the surface waters over the lands in that area is from the northwest part of the Oldfather land in a southeasterly direction, crossing the north-south road to the east on the Snider land and south across the east-west road; that the road ditches on both sides of the north-south road between the Turnell and Mahlin lands are small and will not carry water; and that none of the water that entered the Mahlin land from the north flowed straight south, but would drain in a southwesterly direction off of the Mahlin land and cross the north-south road onto the Turnell land. This witness further testified that the drainage on the west side of the Snider land drained into the road ditch and then through the culvert at the intersection of the north-south road and then south on such road; that the improvement work was done with the permission of the township board to use the east-west road ditch on the

north side of the Mahlin land to run the water along the road in the event it would not damage the road; that he kept the ditch on that side of the east-west road cleaned out; that the ditch on the north side of the east-west road has continued to be filled with silt after heavy rains; and that the last time he knew of any work being done in that ditch was in 1947. He further testified that the ditch on the west side of the north-south road had not been cleaned out or deepened during the past 6 or 8 years; that Turnell mowed the weeds on the west side of the north-south road along his land; that the surface waters that come down from the north follow the north-south road, which divides the Oldfather and Snider lands, and go down the road following the road ditches to the south; and that he has not seen this water over the entire roadway at the intersection where the Oldfather, Snider, Turnell, and Mahlin lands come together. This witness further testified, however, that he had seen this water approximately 100 feet south of such intersection, carried by the road ditches, flood the entire road at that point; that the water carried along the north and west sides of the Mahlin land has not poured over the ditch or flooded; that he has not had to do any work in this ditch after its construction; that the condition of the road ditch and culvert on the west side of the north-south road north of the Turnell driveway, when he observed it 2 days before the trial, was plugged up at the west side, and was about the same as it had been for some time; that Turnell did some leveling in 1951, and there had been no change since that time; that there has always been a ridge on the west side of the north-south road at or near the Turnell driveway as long as he can remember; and that during the years 1955, 1957, 1958, and 1959, the years for which the plaintiffs claim damage to their lands, he never saw any flooding of the crops in this area, nor any evidence of flooding. This witness further testified that the ditch constructed on the north side

of the Mahlin land would be approximately 20 feet wide at the top; that the ditch was oval shaped; that from the level of the land it would vary in depth in places from 2 to 3 feet; and that this ditch was considerably larger than the ditch on the north side of the east-west road.

On cross-examination this witness testified that the purpose of the ditch on the north side of the Mahlin land would be to put the Mahlin land in a higher state of productivity so that it could be more effectively irrigated, and to accomplish this it was first necessary to stop the flow of the floodwaters that came from the north onto the Mahlin land; and that the reason the dike was built and the ditch deepened along the north side of the Mahlin land was so that the floodwaters, which had normally and previously crossed onto the Mahlin land, would be carried along the north side of the Mahlin land and turned west.

Fred G. Webb testified that he was 75 years of age and had been a member of the township board for 12 to 15 years; that he had seen where the water washed the gravel off the north part of the intersection on the north-south road before the construction work was done on the Mahlin land; and that the water comes off the Mahlin land exactly as it did before the construction work was done on the Mahlin land, and spills in the same place it did before such construction was begun.

The plaintiff Osborne Turnell testified in rebuttal that his land had never been flooded by waters from the north.

We have examined the evidence of all the witnesses, but deem it unnecessary to set forth any further testimony given in the instant case for the reason that the same is covered by a summary of the testimony heretofore set forth.

From an analysis of the record, it appears that the witnesses are in general agreement that surface waters entered upon the Mahlin land from the north and pro-

ceeded south into the lagoon. The dispute in the evidence is with reference to the pattern and direction of these waters after they leave the lagoon on the Mahlin land. The plaintiffs' witnesses testified that the waters, when they left the lagoon on the Mahlin land, proceeded in a southerly direction into the Kearney Canal due south of the lagoon, while the defendants' witnesses testified that the general course of the waters from the lagoon was in a southwesterly direction to the approximate southwest corner of the Mahlin land just opposite the southeast corner of the Turnell land. There is no complaint made by Turnells as to any of the waters received by them at this point.

The evidence also shows that the Turnell land is burdened by natural drainage from the northwest to the southeast across such land by means of a ditch which terminates in the southeast corner of the Turnell land. This is a burden that the Turnells are obligated to accept.

The evidence also shows that the Turnells present problem is caused by the concentration of water in the northeast corner of the Turnell land for a distance of 688 feet south from a point 643 feet south of the extreme northeast corner of the Turnell land, and that the waters causing this difficulty come from the east along the north side of the Mahlin land, and these waters are turned south and released from the deepened road ditch at the northwest corner of the Mahlin land where they flow across the north-south road onto the Turnell field; that before the road ditch was deepened and the dike constructed, Turnells' land did not receive waters from the east; that these waters flood not only the 43 acres of Turnell land, but also flood on west across the drainage ditch on such land, covering 65 or 70 acres and, as testified to by Osborne Turnell, at shoulder depth; and that the condition that now prevails by virtue of the construction on the Mahlin land did not occur prior to such construction on the north line of the Mahlin land. There is also evidence to the effect that work has been

done on this dike and road ditch each year since 1948.

In Bussell v. McClellan, *supra,* this court said: "It may however be said with certainty that there was a collection and discharge of water in volume on the property of plaintiffs. The acts involved were committed in disregard of the rights of plaintiffs and the duty which the defendants owed to them. The acts must be regarded as negligence within the proper definition of that term."

In Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467, which cited Bussell v. McClellan, *supra,* and Schomberg v. Kuther, *supra,* with approval, this court said: "It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted." See, also, Pospisil v. Jessen, 153 Neb. 346, 44 N. W. 2d 600; Schomberg v. Kuther, *supra.*

We conclude that the defendants collected surface water into the man-made ditch and by the construction of the dike in such a manner as to discharge, through the ditch, surface waters onto the lands of the Turnells and, by the defendants' acts of negligence, diverted the surface waters so that they would flow in a different direction than the natural flow.

From an examination of the evidence relating to damages alleged to have been suffered by the plaintiffs due to the negligent acts of the defendants, the general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed. See Gledhill v. State, 123 Neb. 726, 243 N. W. 909. This rule would also relate to the loss of crops and damage to the land.

We conclude that the plaintiffs have failed in this action to prove damages that may have resulted to the crops growing on the Turnell land.

While it is true that the construction made on the Mahlin land as heretofore set forth was done by parties other than Wayne Webb, the tenant on such land, the evidence discloses that this work was done with the knowledge of Wayne Webb and for the purpose of making the Mahlin land more productive, and it is apparent that Wayne Webb and Mrs. Mahlin talked about the improvements to be made for the purpose as before stated. With reference to Milton Webb, it is apparent that he did not farm this land, nor did he have very much, if anything, to do with the construction thereon and insofar as this defendant is concerned, he should be dismissed from this case.

Insofar as the Snider land is concerned, the effect of the injunction will take care of the waters backing up on this land due to the construction on the Mahlin land.

We conclude that the prayer of the plaintiffs' petition should be granted, with the exception that no damages be allowed. We reverse the judgment of the trial court insofar as it dismissed the plaintiffs' petition, and remand the cause with directions to render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

BERNARD GOEDEKER, DOING BUSINESS AS NEBRASKA CUSTOM KITCHENS CO., APPELLEE, V. PETER KIEWIT SONS' CO., A CORPORATION, APPELLANT.

106 N. W. 2d 679

Filed December 23, 1960. No. 34851.

1. **Sales.** Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title.
2. ———. In order to have a passing of title there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement.

3. **Contracts: Sales.** Where, pursuant to the terms of an executory contract, materials are to be furnished and labor is to be performed in placing the same in usable condition the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

Story, Pilcher, Howard & Hickman, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Bernard Goedeker, doing business as Nebraska Custom Kitchens Company, brought this action, which is in the nature of a declaratory judgment suit, in the district court for Douglas County against Peter Kiewit Sons' Company, a corporation. The purpose of the action is to have the court determine the ownership of certain personal property on January 12, 1959, when it was totally destroyed by a fire of undetermined origin, in order to fix the responsibility for the loss, both parties allegedly having insurance to cover it. The value of the personal property destroyed is claimed to be $7,995.04. A trial was had. The trial court found and decreed that the defendant was the owner of the merchandise destroyed by the fire of January 12, 1959, and that the reasonable and agreed value thereof was in the sum of $7,995.04. Defendant thereafter filed a motion for new trial and this appeal was taken from the overruling thereof.

For convenience we shall herein refer to plaintiff-appellee Bernard Goedeker, doing business as Nebraska Custom Kitchens Company, as Goedeker, and to defendant-appellant Peter Kiewit Sons' Company, as the Kiewit Company.

Peter Kiewit owned a residence property in Omaha located at 9702 North Thirtieth Street. Sometime in 1958, he apparently entered into a contract with the Kiewit Company for a complete remodeling thereof, for, in October 1958, Kiewit Company commenced doing so, the work being done under the supervision of Nels Lillethorup as foreman.

Goedeker was, at all times herein material, a distributor in Omaha for St. Charles Manufacturing Company's custom-built kitchens, having been in that business in Omaha for about 15 years. Sometime prior to November 13, 1958, he negotiated with a representative of Kiewit Company to completely install a kitchen of this type in the home it was remodeling for Peter Kiewit. These custom-built kitchens are manufactured at St. Charles, Illinois, according to designs submitted by the distributor (here Goedeker) as approved by the customer (here Kiewit Company). Basically, such custom-built equipment consists of cabinets designed and built to fit the architect's plans for the particular room in which they are to be installed. The appliances used in connection therewith usually consist of standard equipment that is available and can be purchased on the open market. It is customary to ship the custom-built equipment disassembled in crates for assembling on the job.

As a result of the negotiations hereinbefore referred to an agreement was entered into by Goedeker with Kiewit Company whereby the former was to furnish and install for the latter a custom-built kitchen in the home it was remodeling for Peter Kiewit. The provisions thereof, insofar as here material, provide:

"You may consider this letter as your authority to proceed with the fabrication and furnishing as well as delivery and complete installation of all kitchen equipment as indicated on your drawing No. 3767-2 dated October 27, 1958 and revised November 10, 1958, for the sum of $8,700.00. * * * It is further understood that all

items of equipment mentioned above will be on hand and ready for installation during the last two weeks of December, 1958. * * * It is further understood that all appliances will be completely installed * * *."

Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title. See, 46 Am. Jur., Sales, § 279, p. 463; Storz Brewing Co. v. Brown, 154 Neb. 204, 47 N. W. 2d 407; § 69-422, R. R. S. 1943. In order to have a passing of title there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement. See, Joyce Wholesale Co. v. Northside L. & M., Inc., 160 Neb. 703, 71 N. W. 2d 186; § 69-418, R. R. S. 1943; 77 C. J. S., Sales, § 154, p. 880; Kopald Electric Co. v. Mandan Creamery & Produce Co., 76 N. D. 503, 37 N. W. 2d 253; Western Silo Co. v. Gogerty, 187 Iowa 1, 171 N. W. 176; Stratton v. Andrew C. Sisman Co., 255 Mich. 451, 238 N. W. 171.

Goedecker ordered the custom-built part of the kitchen from the St. Charles Manufacturing Company of St. Charles, Illinois, with directions that it be delivered during the last 2 weeks in December of 1958. It was loaded by the manufacturer in St. Charles, Illinois, on December 26, 1958, in a furniture van and was then transported to Omaha by a motor common carrier. Due to delays in transit it did not reach Omaha until Saturday, January 3, 1959. Although consigned to Goedeker at his address in Omaha the cardboard crates, containing the custom-built fixtures for the kitchen, were taken directly to the Peter Kiewit residence that was being remodeled and stored therein. Thereafter, on January 12, 1959, the Peter Kiewit residence was destroyed by a fire of undetermined origin as well as the contents thereof, which included the unopened cardboard crates and their contents.

The contract did not consist of a separate sale of the personal property, consisting of the custom-built cabinets and appliances, and the cost of the labor for

the installation thereof. Rather it was a contract for the fabrication, furnishing, delivery, and complete installation of these kitchen fixtures in the kitchen of the Peter Kiewit residence for an agreed price. It was not divisible. Consequently the delivery of a major part of the equipment to be installed in the kitchen to the Peter Kiewit residence, where it was stored with the knowledge and consent of Kiewit Company's foreman, did not constitute a delivery and acceptance thereof by the buyer. See Kopald Electric Co. v. Mandan Creamery & Produce Co., *supra*. As therein held: "Where pursuant to the terms of an executory contract materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless so specifically provided in the contract." See, also, § 69-419, Rule 2, R. R. S. 1943; 46 Am. Jur., Sales, § 420, p. 589; Morel v. Solomon, 203 Miss. 356, 35 So. 2d 314. However, the title may pass under such a situation if such is the intention of the parties even though something remains to be done by the seller to put the property in its final condition. See, § 69-419, R. R. S. 1943; International Harvester Co. v. Brownlee Brothers (Ark.), 329 S. W. 2d 177; 46 Am. Jur., Sales, § 420, p. 590. But that is not the situation here.

During the negotiations leading up to the contract it was the idea of the representative of Kiewit Company that the equipment should be on the Peter Kiewit property in late December of 1958, because he thought the remodeling of the residence would then be far enough advanced to permit the kitchen equipment to be installed. Consequently he wanted the assurance from Goedeker that he could have the equipment there at that time in order to avoid any delay in completing the remodeling. Goedeker assured him that he could. In view thereof the provision, which has been hereinbefore set out to that effect, was included in the parties'

agreement. Appellant aptly described what the parties intended the contract to mean when it states in its brief: "The contract called for the presence of the equipment on the premises during the last two weeks in December of 1958."

The custom-built kitchen equipment did not arrive from St. Charles, Illinois, until January 3, 1959, due to delay in transit. It was then taken to the Peter Kiewit residence and stored therein. However, the kitchen was not ready for its installation so it was left crated. At no time, prior to the fire on January 12, 1959, was the kitchen ready for the equipment to be installed, although Goedeker had his men check it constantly for that purpose. In fact, the parties agreed that the kitchen would not be ready for that purpose until the week of January 19, 1959.

Section 69-422, R. R. S. 1943, provides, insofar as here material, as follows: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that * * * (2) Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Here the evidence shows that Kiewit Company wanted the custom-built kitchen equipment on the property in order to avoid any delay in its being installed whenever it had remodeled the kitchen so that could be done; that Goedeker delivered the equipment on the property on January 3, 1959, and would have immediately installed it if the kitchen had been ready for that purpose; that Goedeker continued to keep informed as to the extent of Kiewit Company's remodeling in order to install the kitchen equipment whenever Kiewit Company had the kitchen ready for him to do so; and that at

no time prior to January 12, 1959, when the fire occurred, was the kitchen in such condition that that could be done. Under this situation we think subsection (2) of section 69-422, R. R. S. 1943, is controlling.

The value of the personal property stored in the Peter Kiewit residence by Goedeker was fixed by the trial court at $7,995.04. From an examination of the record we come to the same conclusion.

In view of what we have said herein we think the trial court arrived at the correct conclusion and therefore affirm the judgment rendered by it.

AFFIRMED.

MARGARET L. BASS, APPELLANT, V. COUNTY OF SALINE, APPELLEE.

106 N. W. 2d 860

Filed December 23, 1960. No. 34854.

1. **Statutes: Officers.** A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office.
2. **Officers.** In discharging the duty of fixing salaries of clerks and employees in his office the county officer must not act arbitrarily, capriciously, or unreasonably.
3. ———. The expression, "with the approval of the county board," authorizes the county board to approve or disapprove the salary fixed by the officer, but such county board must not act arbitrarily, capriciously, or unreasonably in so doing.
4. ———. Where a county officer has fixed the salary of a clerk or employee, and the evidence is undisputed that the salary so fixed is fair and reasonable for the service rendered, a disallowance or reduction of the salary claim by the county board is arbitrary and unreasonable.

APPEAL from the district court for Saline County: EDMUND NUSS, JUDGE. *Reversed and remanded.*

Steinacher & Vosoba, for appellant.

Ach & Ach, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from an order of the district court for Saline County dismissing plaintiff's petition on appeal from the partial disallowance of her salary claim by the board of county commissioners of Saline County.

There is no dispute in the evidence. Plaintiff is the clerk of the county court of Saline County. The evidence shows that on September 15, 1959, the county judge of Saline County informed the county board that he had fixed the salary of plaintiff beginning in October 1959, at $225 per month. In October 1959, plaintiff filed her claim for salary in the amount of $225. The county board allowed the claim in the amount of $190 in accordance with a salary schedule established by it on July 1, 1959. The evidence is not disputed that plaintiff was competent and efficient, and that her services as clerk of the county court were reasonably of the value of $225 per month. The sole question is whether or not the county board, under such circumstances, is required to pay the salary of $225 per month as fixed by the county judge.

It is the contention of the plaintiff that the effect of section 23-1111, R. R. S. 1943, authorizes the county judge to fix the salary of the clerk of the county court, provided that such salary is reasonable and not the arbitrary act of the county judge. It is the contention of the county that the county board is authorized to disapprove the action of the county judge in fixing the salary, even though it is reasonable and fair.

Since 1943 section 23-1111, R. R. S. 1943, has provided: "The county officers in all counties shall have the necessary clerks and assistants for such periods and at such salaries as they may determine with the approval of the county board, whose salaries shall be

paid out of the general fund of the county." In 1953 section 23-1114, R. R. S. 1943, was enacted, reading as follows so far as here applicable: "The salaries of all officers, deputies, and employees of the county, excepting the members of the county board and the county judge, shall be fixed by the county board at least sixty days prior to the closing of filings of certificates of nomination to place names on primary ballot for the respective offices; * * *." It is clear from the reading of these two sections of the statutes that they were in conflict in regard to the fixing of salaries of employees in county offices.

In 1955 the Legislature resolved that conflict by amending section 23-1114, R. R. S. 1943, to read as follows: "The salaries of all elected officers of the county, excepting the members of the county board and the county judge, shall be fixed by the county board at least sixty days prior to the closing of filings of certificates of nomination to place names on the primary ballot for the respective offices; * * *." It will be observed that the word "employees" was omitted from section 23-1114, R. R. S. 1943, as it was amended in 1955. A subsequent amendment of this section in 1959 did not change the act so far as pertinent here. It is fundamental that there can be no such office as a deputy county judge, such an office being unknown to the law, and consequently the provisions of statute relating to deputies have no application to the case at bar. 30A Am. Jur., Judges, § 29, p. 18. For the purposes of section 23-1111, R. R. S. 1943, a county judge is a county officer.

The following rules of statutory construction are applicable here. Statutes pertaining to the same subject matter should be construed together. Such statutes, being pari materia, must be construed as if they were one law and effect given to every provision. Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707; Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N. W. 2d 692. In

enacting a statute the Legislature must be presumed to have knowledge of all previous legislation upon the subject. Sun Ins. Co. v. Aetna Ins. Co., *supra*. The intent of the Legislature is expressed by omission as well as by inclusion. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Johnson Fruit Co. v. Story, *ante* p. 310, 106 N. W. 2d 182. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. State ex rel. Strom v. Marsh, 162 Neb. 593, 77 N. W. 2d 163. County commissioners possess no powers except such as are expressly granted or are incidentally necessary to carry such powers into effect. Ahern v. Richardson County, 127 Neb. 659, 256 N. W. 515.

Applying the foregoing rules of statutory construction, it is clear that the fixing of salaries of employees in county offices is the duty of the various county officers. It was therefore the duty of the county judge of Saline County, under section 23-1111, R. R. S. 1943, to fix the salary of the clerk of the county court.

The Legislature saw fit, however, to limit the authority of the county judge by the use of the words "with the approval of the county board." The primary issue here is the meaning to be given to this limitation. The limitation clearly does not mean that the county board could whimsically or arbitrarily ignore the fixing of the salary of the clerk of the county court by the county judge. To so hold would have the effect of investing the county board with full power to fix salaries of employees in county offices contrary to the expressed intent of the Legislature, and render nugatory the provision of section 23-1111, R. R. S. 1943, granting such authority to county officers.

The word approval generally means to ratify or sanction, but its meaning in a statute may vary in accord-

ance with the sense in which it was intended to be used. See State ex rel. Johnson v. Tilley, 137 Neb. 173, 288 N. W. 521. Its meaning as used in section 23-1111, R. R. S. 1943, has not heretofore been before this court. Similar provisions have been before this court and provisions almost identical have been before the courts of other jurisdictions. We shall examine the reasoning of these cases to determine the meaning intended by the statute before us.

In State ex rel. Johnson v. Tilley, *supra,* the court had before it the meaning of an appropriation bill providing a highway cash fund for the Department of Roads and Irrigation, containing a provision that "not more than the sum of $9,200, to be expended under the direction of the attorney general and subject to the approval of the state engineer, for salaries and office maintenance in the office of the attorney general." The Attorney General filed a claim for the month of July 1939, which the State Engineer refused to approve. In sustaining the claim of the Attorney General this court said: "The amount of work involved in rendering the services and the proportionate charge that should be made therefor is a matter peculiarly within the knowledge and the discretion of the attorney general. In the absence of a showing that such charges are unreasonable or unconscionable, his decision as to the allocation of expenditures must be controlling." See, also, Speer v. Kratzenstein, on rehearing, 143 Neb. 310, 12 N. W. 2d 360; Roberts v. Thompson, 82 Neb. 458, 118 N. W. 106.

In Powers v. Isley, 66 Ariz. 94, 183 P. 2d 880, the court had before it statutory language almost identical with that in section 23-1111, R. R. S. 1943. The statute there involved provided: "The salary of the court reporter shall be fixed by the judge of the court, with the approval of the board of supervisors of the county, and paid by the county; * * *." In holding that the board of supervisors exceeded its authority in reducing the salaries of court reporters below that fixed by the

judge, the court said: "The province of the Board of Supervisors in connection with the approval of the salary fixed by the judge * * * is interpreted to be that the Board of Supervisors have the power to approve or disapprove the salary fixed by the judge for the court reporter. That in performing this duty the Board of Supervisors must exercise discretion, but they must act in a reasonable manner and not arbitrarily or capriciously in disapproving such salary. Neither must the judge in fixing the salary act arbitrarily or capriciously or unreasonably. In this particular case plaintiffs allege in their complaint that five judges * * * determined that the proper salary for each of the court reporters * * * should be the sum of $3600, and by proper order so fixed the salary. The same was submitted to the Board of Supervisors. They neither approved or disapproved the salary as fixed by the judges, but arbitrarily proceeded upon their own initiative to reduce the salary fixed by the judges in the sum of $3300. It appears from the allegations of the complaint that the Board of Supervisors exceeded their authority in this particular case." See, also, State ex rel. Kuhlemeier v. Rhein, 149 Iowa 76, 127 N. W. 1079.

We conclude from the foregoing authorities that the statute authorizes the county judge to fix the salary of the clerk of the county court. In so doing he must not act arbitrarily, capriciously, or unreasonably. The limitation placed upon the authority of the judge in fixing the salary of the clerk of the county court to the effect that it should be done "with the approval of the county board" authorizes the county board to approve or disapprove the act of the county judge, but in so acting the county board may not act arbitrarily, capriciously, or unreasonably. In the absence of evidence that the salary fixed by the county judge is unreasonable, capricious, or arbitrary, the county board is without authority to disapprove it.

Since the evidence establishes without dispute that

the reasonable value of the service of the plaintiff as clerk of the county court is $225 per month, the failure of the county board to approve such salary is arbitrary and unreasonable. Under the record before us the plaintiff is entitled to a judgment for the unpaid amount of the salary fixed by the county judge.

The trial court was in error in overruling plaintiff's motion for a new trial. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

JULIUS YOUNG ET AL., APPELLANTS, V. CITY OF SCRIBNER, A MUNICIPAL CORPORATION, APPELLEE.
106 N. W. 2d 864

Filed December 30, 1960. No. 34849.

1. **Municipal Corporations: Waters.** When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains.
2. ———: ———. While the grant of power to a city of the second class to construct sewers or drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers or drains as it constructs in proper condition and repair and free from obstruction, and will be held liable for damages to property resulting from its failure to do so.
3. ———: ———. When such a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows and damages private property, the city itself will be liable for such injury.
4. ———: ———. It is a well-settled principle of law that neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another

in a greater quantity than what would have reached the property by natural drainage.

5. **Municipal Corporations: Nuisances.** Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded with directions.*

Sidner, Lee, Gunderson & Svoboda, for appellants.

Spear, Lamme & Simmons, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, Julius Young and Ruby Young, as owners of a dwelling house property known as Lot 10, Block 39, in Scribner, a city of the second class, brought this action in equity against defendant city seeking to require it to remove certain obstructions theretofore placed by defendant in its drainage ditches in the city street to the south and east of plaintiffs' property; to enjoin defendant from thereby casting surface waters on plaintiffs' premises; and to recover damages to their property caused by such obstructions and inadequate drainage which flooded plaintiffs' property. The primary relief sought by plaintiffs, as the issues were joined by the parties, was to obtain mandatory injunctive relief requiring defendant to enlarge its inadequate culvert and drainage facilities in the intersection of State and Grant Streets west and south of plaintiffs' property in order to adequately drain the water therefrom west and south, or in the alternative to require defendant to remove certain obstructions placed by defendant in the north roadside ditch on Grant Street at a church driveway on Lot 11 east of plaintiffs' property in order to drain the water therefrom to the east.

In that connection, defendant's answer denied generally, then admitted its municipal status and plaintiffs' ownership of the property. However, defendant also denied that plaintiffs ever had any drainage to the east and alleged that plaintiffs' drainage had always been west and south and that defendant's culvert and facilities constructed by it in the intersection to the west and south were adequate.

The cause was tried and submitted to the trial court on April 9, 1959. Thereafter, on January 6, 1960, a judgment was rendered which found and adjudged the issues generally in favor of defendant and dismissed plaintiffs' petition, with costs taxed to plaintiffs. Subsequently, plaintiffs' motion for new trial was overruled and they appealed, assigning and arguing in substance that the trial court erred in dismissing plaintiffs' petition and in not requiring defendant to remove obstructions in at least one or the other of its roadside drains serving plaintiffs' property. We sustain plaintiffs' contentions, pointing out, however, that plaintiffs' evidence was insufficient to enable the trial court or this court to determine with any degree of accuracy the dollar amount of plaintiffs' damages. It is sufficient in that connection to say that plaintiffs did establish by competent evidence that they sustained continuing damages by flooding during 1957 and 1958. In that connection, it is elementary that in such a situation injunction is a proper remedy because equity looks to the nature of the continuing damages inflicted rather than to the magnitude thereof as a ground of affording relief.

Actions in equity, such as that at bar, are triable de novo by this court upon appeal, in conformity with the rule of this court, reaffirmed as recently as Peters v. Woodmen Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490.

As far as important here, section 17-508, R. R. S. 1943, gives second-class cities the power to provide for the

grading and repair of streets and the construction of culverts and sewers.

In Cattin v. City of Omaha, 149 Neb. 434, 31 N. W. 2d 300, this court said: "The following authorities are likewise pertinent to this appeal.

" 'When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains.' McAdams v. City of McCook, 71 Neb. 789, 99 N. W. 656. This case recognized the rule that the city is under no obligation to construct a system of drainage for protection from the surface water, but having constructed a system of drainage, the city is not entirely absolved from liability for injury caused to the private property by its failure to keep the ditches in proper control after they have been constructed.

"As stated in 4 McQuillin, Municipal Corporations (2d ed. rev.), § 1568, p. 432: 'While as stated a grant of power to a municipal corporation to construct sewers and drains does not require it to do so, yet if it does exercise the power conferred, it is bound to use ordinary care or exercise due diligence to keep such sewers and drains as it constructs in proper condition and repair and free from obstructions, and will be held liable for damages to property resulting from its failure to do so.'

"In Randall v. City of Chadron, 112 Neb. 120, 198 N. W. 1020, this court held: 'Where a city has constructed in its streets a system of gutters or drains to carry off surface water, it is charged with the duty of ordinary care to maintain them in a proper manner; and where one of its agents negligently and carelessly obstructs a gutter or drain in such a manner as to dam the flow and raise the water in the street to such a height that it overflows the curb and runs into the basement of plaintiffs' store, injuring a part of a stock of goods, the

city itself will be liable for such injury.' See, also, McAdams v. City of McCook, supra; 6 McQuillin, Municipal Corporations (2d ed. rev.), § 2869, p. 1227; Pevear v. City of Lynn, 249 Mass. 486, 144 N. E. 379.

"In the last cited case it is said: 'The law governing actions of this nature is settled. A municipality is not responsible for damages which accrue to individuals through any defect or inadequacy in the plan of its system of sewers, because that is established by public officers acting, not as its agents, but in a quasi judicial capacity for the benefit of the general public. A municipality is responsible for damages which accrue to individuals through negligence in the construction, maintenance or operation of its system of sewers, because that system when constructed becomes the property of the municipality, no one else can interfere with it and its care and continuance devolve wholly upon the municipality through such agents as it may select." See, also, 38 Am. Jur., Municipal Corporations, § 629, p. 330, § 636, p. 340, § 639, p. 344, § 645, p. 351.

In Naysmith v. City of Auburn, 95 Neb. 582, 146 N. W. 971, this court said: "We take it that it is a well-settled principle of law that neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. Elliott v. Oil City, 129 Pa. St. 570; Byrnes v. City of Cohoes, 67 N. Y. 204; 30 Am. & Eng. Ency. Law (2d ed.) 339; Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526. In 10 Am. & Eng. Ency. Law (2d ed.) 243, it is said: 'It is well settled according to all the authorities that, were (sic) the effect of the sewer, whatever its plan, is to cause a direct invasion of private property by collecting and throwing upon it in new channels or in increased quantities water that would not otherwise have found its way there, the corporation is liable.' We can conceive

no reason why the same rule should not be applied to surface drainage or surface sewers."

In City of Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996, involving facts comparable in some material respects with those at bar, this court said: "The mere right of a proprietor to defend himself against surface water without being responsible for the consequences has never been denied by this court. But there may be a difference between the possession of a right and the manner of its exercise. In the case at bar it may be conceded that the city had a right to grade the street in question,—to build the embankment therein. This right we do not call in question. It is only the manner of the exercise of that right that is involved in this litigation."

Also, in Goodrich v. University Place, 80 Neb. 774, 115 N. W. 538, this court held: "By accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liabilities flowing therefrom and incident thereto in the same manner and to the same extent as any other municipality; and such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed."

As stated in 63 C. J. S., Municipal Corporations, § 770, p. 69, citing numerous authorities: "Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it." See, also, 63 C. J. S., Municipal Corporations, § 879, p. 265, § 880, p. 268, § 893, p. 294; 38 Am. Jur., Municipal Corporations, § 643, p. 348.

In the light of such authorities, we have examined the record. It discloses that some of the evidence is undisputed and that some of it is conflicting; but we bear in mind that some material conflicting testimony given by the city officials and agents in defendant's behalf

was either equivocal or incredible when considered in the light of two undisputed surveys made by the county surveyor, and photographs reflecting the flooded condition of plaintiffs' property in 1958, which were offered and received in evidence.

Plaintiffs purchased the property in 1944 and moved into it in 1945 when their son, who was a tenant thereon, had moved out. It is undisputed that from 1944 to 1957 plaintiffs' property had never been flooded. The property is 256.2 feet long, running east and west, and is 85 feet wide, running north and south. It is bordered on the west by State Street and on the south by Grant Street, which streets intersect at the southwest corner of plaintiffs' property. The two surveys made by the county surveyor show the topography and pertinent elevations of plaintiffs' property and of State and Grant Streets bordering plaintiffs' property up to and beyond the intersection thereof, and show an admittedly inadequate 18-inch culvert therein which had been installed by defendant to drain water to the south beyond the intersection. In that connection, said culvert was one-tenth of a foot higher at the south end than it was at the north end. One such survey was made at request of plaintiffs, wherein the elevations were taken at the flow line of a ditch running south on the east side of State Street, and the other was made at request of defendant wherein comparable elevations were taken at the flow line of defendants' culvert at the intersection.

By such survey and other evidence it was established that from a point about one and one-half blocks north of plaintiffs' property, State Street slopes south down to and along the west end of plaintiffs' property, thence south across the intersection and on south beyond it. A ditch on the east side of State Street drains the water south into the culvert in the intersection, thence on to the south. The southwest corner of plaintiffs' property, which is the northeast corner of the intersection, is

lower than either end of the city's culvert, and is lower than the west side of the intersection and the northwest corner of Grant Street therein.

From 1943 to 1956, there was a ditch in the street on the north side of Grant Street which extended from the southwest corner of plaintiffs' property, thence east along the south side of plaintiffs' property, thence east along and beyond adjacent Lot 11 where a Catholic church was constructed upon higher ground about 1956. One witness who lived on plaintiffs' property in 1943 and 1944, one witness who lived on said property in 1944 and 1945, plaintiff Julius Young who lived thereon from 1945 to date, and his daughter, a nurse, who lived there with plaintiffs from 1952 to date, testified that there was such a ditch. Before construction of the church, there was a slight rise about midway in plaintiffs' land where they had a garage and a driveway leading thereto from Grant Street. There is evidence that to the east of plaintiffs' driveway the water then drained east, and to the west thereof it drained west and south. Some witnesses for defendant testified contrary thereto, but subsequent events and other evidence, together with pertinent elevations of the ditch and adjacent property, reasonably indicate otherwise.

In that connection, the surveys demonstrate, and the evidence discloses, that the church was constructed on Lot 11 about 1956, and that about midway thereof there is a rise on the north side of Grant Street where the roadside ditch had been filled without any culvert, and had been subesquently graveled over by the city for a driveway to the church. Some 4 feet under said driveway, in order to protect the water from freezing, the city had theretofore constructed and buried its extended sewer and water pipes needed for the church. How deep the ditch was before filling without any culvert thereunder is not definitely shown, but, in any event, it appears from the surveys and evidence that there is a roadside ditch which distinctly slopes to the

west from such church driveway and along the east end of plaintiffs' property to the rise in plaintiffs' driveway and beyond to the intersection, and that there is a roadside ditch which distinctly slopes from such church driveway to the east along the east end of its property, thence east along adjoining Lot 12 to a point where the drainage is south. Also, about the same time, the city placed asphalt on Grant Street to a point beyond the church property, which increased the flow of water to the west and south. As a result, surface water flowed down the north ditch in Grant Street from the church property and driveway and over the east end of plaintiffs' property. It also flowed over asphalted Grant Street and down the ditch on the east side of State Street to the inadequate culvert in the intersection, where accumulations of water backed up and flooded plaintiffs' property.

Upon complaint thereof to city officials by plaintiff Julius Young in 1957, the city admittedly put a culvert in the north ditch under plaintiffs' garage driveway and constructed a dike on the north side of the ditch in Grant Street along the south side of plaintiffs' property. The city refused to place an enlarged culvert in the intersection to drain such waters south unless plaintiffs would furnish the culvert and because in any event there would be too much opposition thereto by residents living south thereof who had driveway drains that might be too small to carry the water. The city also refused to remove the obstruction at the church driveway or put a culvert thereunder so the water would drain east from plaintiffs' driveway, because of danger to the city's water and sewer connections to the church. As a result of the foregoing situation, water came down over and inside the dike, admitted to have been wrongfully constructed by the city, and accumulated on the east end of plaintiffs' land, which water, together with water accumulated in the intersection, flooded plaintiffs' property and seriously damaged or

destroyed plaintiffs' garden, strawberry and raspberry crops, and other property. As a matter of fact, plaintiffs' property was so flooded three different times in 1957 and twice in 1958. The extent and manner thereof in 1958 is demonstrated by photographs offered and received in evidence.

In that situation, plaintiffs brought this action contending that defendant should be required to remove the obstructions placed by the city in the north roadside ditch east of plaintiffs' property and thus carry drainage to the east, which would admittedly be more expensive, or in the alternative to provide an adequate culvert and facilities in the intersection for city drainage to be carried away to the west and south of plaintiffs' property.

On the other hand, defendant contends that there never was any ditch which carried drainage from plaintiffs' property to the east, although defendant admits that it had installed water and sewer connections for the church under the filled-up ditch without a culvert, and had leveled same with gravel for the church driveway from Grant Street, as heretofore mentioned; that it put a culvert under plaintiffs' driveway and wrongfully constructed the dike in and along Grant Street north of the ditch along the south side of plaintiffs' property; and it is undisputed that defendant's culvert in the intersection of State and Grant Streets was inadequate to carry the drainage south. As a matter of fact, defendant's officers and agents who testified, claimed that but little if any water had ever flooded plaintiffs' land when they viewed it, which is refuted by direct evidence and the photographs received in evidence; that in any event defendant's facilities were adequate and the flood of plaintiffs' land came from and was caused solely by heavy rains more than would be normally anticipated, which the record does not sustain; and that plaintiffs were not entitled to relief because some other people in Scribner had similar trouble, which is not a legitimate defense. Defendant also argued that, under the

circumstances, defendant was not liable as a matter of law. We do not agree.

In that connection, authorities relied upon by defendant are entirely distinguishable upon the facts. To discuss them at length herein would serve no useful purpose. Suffice it to say that this is not a case wherein plaintiffs simply sought to require defendant to provide surface water drainage for their property in a situation where such drainage had been obstructed by third parties. Rather, it is a case wherein defendant's officials and agents, by their own wrongful and negligent acts of omission and commission, caused the obstructions and flooding and thereby created a nuisance upon plaintiffs' property.

We decide, upon trial de novo, that plaintiffs were entitled to the mandatory injunctive relief sought by them. Therefore, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment finding and adjudging the issues in favor of plaintiffs and against defendant, and granting plaintiffs the mandatory injunctive relief sought by plaintiffs. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE GUARDIANSHIP OF ROBERT LEE WORKMAN ET AL. DOLORES LUCILLE WORKMAN, INDIVIDUALLY AND AS GUARDIAN OF ROBERT LEE WORKMAN ET AL., APPELLEES, V. FRANK M. WORKMAN ET AL., APPELLANTS.

106 N. W. 2d 722

Filed December 30, 1960. No. 34863.

1. **Guardian and Ward: Appeal and Error.** Appeals to this court in the matter of the appointment of guardians are heard and determined de novo.

2. **Guardian and Ward.** A proceeding for the appointment of a guardian is a probate matter.
3. ———. Under the provisions of section 38-104, R. R. S. 1943, a minor over the age of 14 years has a right to nominate his own guardian and ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such.
4. **Guardian and Ward: Appeal and Error.** Subject to the rights of parents as natural guardians of their minor children and the statutory rights of minors over 14 years of age to nominate their own guardians, the selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment and ordinarily this court will not interfere therewith unless an abuse of discretion is shown.
5. **Guardian and Ward.** If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right.
6. ———. Where a minor has, for a number of years, been in the custody and care of a certain person who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would be in the best interest of the minor.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Max Kier, for appellants.

Crosby, Pansing & Guenzel and *Perry, Perry & Nuernberger,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This litigation originated in the county court of Lancaster County. It involves the appointment by the county court of Lancaster County of a successor guardian in each of three separate guardianship proceedings pending therein. In the district court for Lancaster County, on appeal thereto from the county court, the three cases were, by stipulation, consolidated for the purpose of trial. Trial was had and each of the three

appeals was dismissed. The parties objecting to the appointment of the successor guardian thereupon filed one or more motions for new trial in each case, which were overruled. The cases were then, by stipulation, consolidated for the purpose of appeal to this court and an appeal was thereupon taken from the orders overruling the motions for new trial. This opinion will dispose of all three cases.

Appeals to this court in the matter of the appointment of guardians are heard and determined de novo. Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68.

Appellant Frank M. Workman, to whom we shall herein refer as the father, and appellee Dolores Lucille Workman, to whom we shall herein refer as the mother, are the parents of four living children. They are Dellouise Workman Carroll, a married daughter, born December 19, 1937; appellant Joseph M. Workman, a son, born June 8, 1942; Robert Lee Workman, a son, born June 17, 1943; and Francine L. Workman, a daughter, born March 20, 1947.

On March 15, 1950, the county court of Lancaster County, with the consent of the mother, appointed the father guardian of each of the three youngest of these children, namely, Joseph M., Robert Lee, and Francine L. On May 7, 1955, the county court of Lancaster County, on the petition of the mother, removed the father as guardian of each of said minors and appointed Joseph Ginsburg to succeed him. In so doing the county court found: "* * * the best interests of said minors can be served by the appointment of an independent guardian to protect the vested property rights of said minors in said trust." The father's removal as guardian in each of these guardianships was ultimately affirmed by this court. See Workman v. Workman, 168 Neb. 408, 95 N W. 2d 704.

Ginsburg continued to act as guardian for each of these minors until August 7, 1957, when, at the suggestion of the mother, he filed his resignation with the county

court in each of the guardianships. Thereafter, on either August 8, 1957, or August 15, 1957, the mother filed a petition in each of the guardianships asking that she be appointed guardian, therein stating that any conflicts between the interests of each of said minors and herself as to property matters had been eliminated. The father filed objections to the mother's request in each of the guardianship proceedings as did the son, appellant Joseph M., in his own guardianship proceeding. On August 30, 1957, the county court, in each of the guardianship proceedings, accepted the resignation of Joseph Ginsburg and appointed the mother to become the successor guardian, therein finding: "* * * the court further finds and adjudges that Dolores Lucille Workman has been awarded the legal custody of each of said minors by the Supreme Court of Nebraska and the District Court of Lancaster County, Nebraska, that no conflict in interest between said mother and said minors exists and that it is to the best interests of said minors and their estate that she be appointed guardian with full authority to act for the protection of their interests and that probable cause of the necessity of action by the guardian on behalf of the interest of said minor wards and each of them has been shown." The mother qualified as guardian in each case and letters of guardianship were issued to her by the county court on September 4, 1957. The father, in each case, as well as the son Joseph M., in his own guardianship proceeding, appealed to the district court, giving bond for that purpose.

Transcripts containing the necessary records of the county court in each guardianship proceeding were filed in the district court for Lancaster County on September 19, 1957. Pleadings were thereupon filed in the district court in each case. The cases were then jointly tried, upon the issues raised, and were disposed of by the district court in the manner hereinbefore set forth.

This appeal does not involve the custody of these

minor children, which has already been determined by this court as being in the mother. See Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368. Any desired change therein, because of changed conditions arising subsequent thereto, must be brought in that action in the district court.

A proceeding for the appointment of a guardian is a probate matter. See Cass v. Pense, *supra*. In each appeal, both to the district court and to this court, appellants gave proper bonds, all of which were approved. See § 30-1603, R. R. S. 1943. In view of the fact that during the time these appeals were pending the mother, as guardian, with the approval of the county court, brought several actions against Capitol Investment Company, amended her pleadings in another case, and entered into a contingent fee contract with her attorneys, appellants suggest we determine her status as guardian, contending her authority to act as guardian was superseded by the appeals and that any actions she has taken as guardian are void. The only questions presented by this appeal are, did the county court exceed its authority in appointing the mother as successor guardian and, if not, did it abuse its discretion in appointing her? Whether or not the guardian had, with the county court's approval, authority to bring and maintain the actions referred to and whether or not she had authority, with the county court's approval, to enter into the contingent fee contract with her attorneys during the pendency of these appeals, can be raised and determined in those actions and, as to the contract involving attorneys' fees, when it is sought to be enforced. However, in regard to the mother's right to bring and maintain such actions in behalf of these minor children as their next friend, see Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

Section 38-104, R. R. S. 1943, provides as follows: "If the minor is under the age of fourteen years, the court of probate may appoint his guardian, and if he

is above the age of fourteen years he may nominate his own guardian, who, if approved by the court, shall be appointed accordingly."

The son, appellant Joseph M. Workman, being over the age of 14 years, objected to the appointment of his mother as his guardian, suggesting that he would rather have his father be his guardian but, if he couldn't have his father as his guardian, that he preferred to have an outsider. The record leaves no doubt of the fact that the father is disqualified to act as such because of the position he has taken in regard to the rights of his children in an irrevocable trust created by the father and mother on February 20, 1950, for the benefit of their then four minor children. See Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

Section 38-105, R. R. S. 1943, provides: "If the guardian nominated by such minor shall not be approved by the court, or if the minor shall reside out of the state, or if, after being cited by the court, he shall neglect to nominate a suitable person, the court may appoint the guardian in the same manner as if the minor were under the age of fourteen years."

Under these statutory provisions a minor over the age of 14 years has a right to nominate his own guardian and ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such. See 39 C. J. S., Guardian and Ward, § 14, p. 26. Here the father was disqualified and the minor made no other specific nomination except the general statement that he preferred an outsider over his mother.

Subject to the rights of parents as natural guardians of their minor children and the statutory rights of minors over 14 years of age to nominate their own guardians, the selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment and ordinarily

this court will not interfere therewith unless an abuse of discretion is shown in connection therewith. See, 39 C. J. S., Guardian and Ward, § 18, p. 32, § 28 a, p. 48; In re Guardianship of Lancey, 232 Iowa 191, 2 N. W. 2d 787; In re Guardianship of McCoy, 46 Cal. App. 2d 494, 116 P. 2d 103; §§ 38-104, 38-105, 38-107, R. R. S. 1943; Tiffany v. Wright, 79 Neb. 10, 112 N. W. 311.

After the father had been appointed and qualified as guardian of each of these minors the parents became involved in marital difficulties which resulted in an action for divorce being filed in the district court for Lancaster County by the mother in November 1954. Thereafter, in 1955, the county court removed the father as guardian and appointed Joseph Ginsburg to succeed him, basing its action in doing so on the finding hereinbefore set forth. The "trust" referred to therein is the irrevocable trust hereinbefore referred to which was created by the mother and father for the benefit of their children. At the time Ginsburg was appointed to succeed the father as guardian neither the custody of the minor children nor the marital property rights of the parents had been determined and the appointment of an independent guardian to protect the property rights of the minors in the trust was entirely proper. The divorce action ultimately was determined by this court in our opinion reported as Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, which placed the custody of the minor children in the mother and definitely fixed the rights of the mother insofar as her right to alimony is concerned. Subsequent to our mandate therein, which was issued July 3, 1957, the parents, on December 20, 1957, made what is referred to as a "Partial Settlement." It is referred to in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186.

After our mandate in the divorce action was issued the mother made application in each of the three guardianship proceedings to be appointed guardian therein, Joseph Ginsburg having previously resigned at her re-

quest. Prior to our opinion in Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, the mother's position as to the irrevocable trust, which she and the father had created for the benefit of the children, was contrary to the best interests of the children. However, subsequent thereto she changed her position in regard thereto and sought to have it fully enforced. She was then no longer disqualified to act as guardian because of her position in regard thereto. This fact is fully evidenced by what we said and held in Workman v. Workman, 167 Neb. 857, 95 N. W. 2d 186, about this litigation. In this respect the previous finding by the county court in 1955 to the effect that "the best interests of said minors can be served by the appointment of an independent guardian" was no longer true, in view of these changed conditions, and therefore not binding on that court.

If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right. And, where a minor has been for a number of years in the custody and care of a certain person, here parent, who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would, it seems to us, be in the best interest of the minor. See, 25 Am. Jur., Guardian and Ward, § 29, p. 25; 39 C. J. S., Guardian and Ward, § 17 a, p. 28.

We think the best interests of the three minors will be best served, both as to custody and as to their property rights, by the appointment of their mother as guardian. In view thereof we affirm the district court's action in dismissing all three appeals taken to it from the county court.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1961

ALBERT F. ROOS ET AL., APPELLEES, V. CONSUMERS PUBLIC POWER DISTRICT, APPELLANT, CONSOLIDATED WITH DONALD H. SALLENBACH, APPELLEE, V. CONSUMERS PUBLIC POWER DISTRICT, APPELLANT.

106 N. W. 2d 871

Filed January 6, 1961. No. 34861.

1. **Negligence: Trial.** In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied.
2. **Electricity: Negligence.** An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury.
3. ———: ———. Among the circumstances to be considered in such a case is the well-known dangerous character of electricity and the inherent risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger.
4. ———: ———. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case.
5. ———: ———. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may reasonably be expected to be.
6. ———: ———. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur,

does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire.

7. ———: ———. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, meaning the highest degree of care and skill which is used or may be used by others engaged in the same or similar business under the same or similar circumstances, notwithstanding that injury has resulted from contact with a fallen wire, the electric company, as a matter of law, has not failed in the performance of its duty.
8. ———: ———. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought.
9. ———: ———. In the performance of its duty to exercise due care and skill under the circumstances, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence.
10. ———: ———. On the other hand, it is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies would constitute them insurers against injury.
11. ———: ———. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects.
12. ———: ———. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom.
13. ———: ———. When an electric company conducts its business with due care and diligence it ordinarily is not liable for a defective condition of its appliances of which it has no notice.
14. ———: ———. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach.
15. ———: ———. The evidence in this case does not show that the electric company had or ought to have had the means of detecting by inspection the fatigue fracture that caused the

break in the line, which fatigue fracture was found to be the cause of the break only upon examination under a high-powered microscope. Liability for improper inspection does not attach under such circumstances.

16. ———: ———. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Blackledge & Sidner, for appellant.

Oscar A. Drake, John E. Dougherty, and *James R. Ganz*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The plaintiffs brought separate actions for property damages sustained because of the negligence of the defendant in not properly maintaining its electric lines and in failing to properly inspect such lines and discover the defects therein which resulted in the plaintiffs' injuries. A verdict was returned by the jury for each of the plaintiffs. The defendant has appealed. The two cases were consolidated for trial in the district court and for the purpose of appeal to this court.

The plaintiffs Roos are the owners of a two-story hotel building and a one-story office building in Gibbon, Nebraska. The plaintiff Sallenbach was a tenant of the south office in the office building, which he was using as his office for the practice of medicine. The other office in the office building was immediately north of the doctor's office. It adjoined the hotel building to the north, and was rented to Max Wilkie, a livestock dealer. On February 27, 1958, the office building was destroyed and the hotel building damaged by an explosion. The actions presently before the court are for the damages resulting from this explosion.

The evidence shows that during the evening of February 26, 1958, a storm struck the area in and around Gibbon, which extended into the next day. The evidence is that the storm brought rain, sleet, and snow, accompanied by high, gusty winds and freezing temperatures. The storm was described as a blizzard of unusual severity. At about 3 a.m., on February 27, 1958, a primary conductor wire broke and the live ends came in contact with the ground. The broken wire came in contact with telephone service wires passing under the distribution lines of the electric company. There is evidence also that one of the broken primary wires came in contact and fused with a natural gas regulator, and caused high-voltage electrical current to energize the gas main of the gas company that services the area.

The area involved is a distance of 2 blocks in an east and west alley between LaBarre Avenue and Niles Street. The alley was immediately south of the doctor's office hereinbefore described. The telephone wires which came in contact with the broken primary wire entered an underground telephone cable running north and south on LaBarre Avenue, which cable had been installed prior to the paving of LaBarre Avenue. Subsequent to the paving of LaBarre Avenue the gas company laid a gas main in the alley which crossed LaBarre Avenue at its intersection with the alley. The gas main had been forced through under the pavement and, unknown to anyone until after the explosion, it passed immediately under and in contact with the above-mentioned telephone cable. Due to the energizing of the telephone wires or of the gas main, or both, arc burns occurred at the point where the telephone cable and gas main were in contact in the intersection of the alley with LaBarre Avenue. As a result a hole was burned in the cable and in the gas main, the latter permitting a large amount of natural gas to escape. The escaping gas followed the sand-and-gravel fill around service lines leading into

the offices of Dr. Sallenbach where, after an accumulation of gas, it came in contact with the pilot lights of an automatic gas furnace and a water heater, and the explosion resulted. It is not disputed that the breaking of the power line precipitated the chain of events which brought about the explosion. The defendant does contend that the installation of the gas main across LaBarre Avenue in such a way as to be left in contact with the telephone cable was an intervening factor which would relieve it from liability. The complete answer to this contention is that the contact of the gas main and the telephone cable was a condition and not an intervening cause as that term is used in the law of negligence.

The causes of action of the plaintiffs are based on a charge of negligence by the defendant in the following respects: (1) Defendant negligently and carelessly maintained the high-voltage electric line after it became weakened by stress from long use which made it unfit for use on February 27, 1958; and (2) that defendant negligently failed to properly inspect the electric line when such an inspection would have revealed its dangerous condition. We point out that plaintiffs, by pleading acts of negligence as their causes of action, may not rely upon the doctrine of res ipsa loquitur. Miratsky v. Beseda, 139 Neb. 229, 297 N. W. 94; Security Ins. Co. v. Omaha Coca-Cola Bottling Co., 157 Neb. 923, 62 N. W. 2d 127; Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228; Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380. The burden of proving the acts of negligence alleged is upon the plaintiffs. Defendant contends that plaintiffs have not met this burden and that its motions for directed verdicts should have been sustained.

The defendant's power line was located on the north side of the alley. The break in the line occurred in the next block east of the block in which the Roos property was located. It was 21 feet from the west edge of this block to the first pole in the power line in this

block. It is designated in the record as pole 1. From pole 1 to the next pole to the east it was 96 feet. The latter pole is designated as pole 2. From pole 2 to the next pole to the east it was 107 feet. This latter pole is designated as pole 3. The break in the line is alleged to have occurred between poles 2 and 3, although there is evidence that it may have occurred at pole 2. The primary line consisted of three wires on cross-arms at the top of the poles. The primary line was a 2,400-volt line. Below the primary line on similar cross-arms was a distribution line which provided the electrical energy for electric light users in the area. Below the second series of cross-arms was a three-wire power line serving users of power in the area, which was attached to the poles with vertical brackets. The telephone service wires passed under the electric company's wires between pole 1 and pole 2. The wire that broke was the middle primary wire on the top series of arms. The voltage on the two lower lines was 240 volts.

There is evidence that the wire broke between poles 2 and 3. The evidence is not clear as to the exact place where the wire broke. The broken wire became detached from pole 2, making it necessary for the repairman to cut down the broken live wires at poles 1 and 3. It appears to be the theory of the plaintiffs that the wire broke close to the insulator on pole 2, since a part of the tie-wire which was also broken was on the conductor wire at the point of the break. It is evident on plaintiffs' theory that the west part of the broken wire contacted the gas regulator about 24 inches from the end and melted the wire at that point, leaving the 24-inch end of the wire near the regulator where it was found. This 24-inch section of the conductor wire is in evidence and designated as exhibit 1.

The plaintiffs called the witness W. F. Weiland, who qualified as an expert on the physical and mechanical behavior of metals as affected by stresses, fires, electrical currents, heat, and explosions under all circum-

stances and conditions. Professor Weiland determined the cause of the break to be a fatigue fracture which he described as follows: A fatigue fracture may start as a minute scratch on the wire, a scratch almost imperceptible to the human eye, and as it is bent back and forth a little bit over a period of years, a crack begins to form, and, eventually the crack travels into the wire to such an extent that the wire breaks. . He stated that this may be a little crack or a little nick that has developed because of a slight line of corrosion on the wire, or a sharp corner, or it may develop because of impurities within the wire, and in each case it may continue to develop until it breaks because of what is technically called a fatigue fracture. Exposure to the elements, including fumes, gases, and moisture in the air, tends to accelerate the eating into the metal. As to whether or not an inspection could be made that would disclose such a defect, which he was able to discover only with a high-powered microscope, he stated that a visual inspection of areas of suspicion should be made, areas where tie-wires are used, or the twisting of the conductor wire is evident, as well as where sharp corners exist.

Professor Weiland also testified that the dangling of insulation from the wire, referred to in the record as festooning, was some indication of the age of the wire. He stated also that the sag in the wire, estimated by the employee who repaired the break to be 4 feet, was indicative of a fatigued wire.

The defendant called W. A. Richardson, who qualified as an expert in the field of municipal engineering which includes waterworks, sewerage, paving, electrical distribution systems, transmission lines, natural gas systems, power plants, and the like. He testified that the festooning of the insulation on the primary wires had no relation to the efficiency or safety of the power lines as it related to a break in the wire; and that it was common practice to construct high-tension power lines

with noninsulated wire. He testified that the ordinary life of copper wire such as was here used was approximately 50 years. He testified that the normal sag in such a line between poles 107 feet apart is 2 feet, that a sag of 4 feet does not affect the efficiency or safety of such a line, and that the additional sag would tend to reduce rather than increase the tension on the line. This evidence is not disputed.

There is no evidence in the record that the festooning of the insulation on the conductor wire or the sagging of the line in any manner contributed to the breaking of the wire. There is no evidence that adequate tolerance was not provided to protect against unusual weather and the accumulations of ice on the primary line. The local representative of the defendant testified that he observed the condition of these lines at frequent intervals by inspection by ground patrol. There is no evidence that any other type of inspection was required or was more practical. This is, we think, a fair statement of the facts upon which we must determine if the defendant was negligent in not properly maintaining the line, and whether or not it was negligent in not properly inspecting the line and discovering the fatigue fracture before the break occurred.

A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property. Scott v. Claiborne Electric Cooperative (La), 13 So. 2d 524; Gellert v. Missouri Service Co. (Mo.), 221 S. W. 2d 177; Rice v. City of Lumberton, 235 N. C. 227, 69 S. E. 2d 543. Electric companies

are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. New Omaha Thompson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89. Such companies, being engaged in the transmission of a dangerous commodity, must anticipate and guard against events which may reasonably be expected to occur, and a failure to do so is negligence. A failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619. "The law does not require impossibilities of such companies in avoiding accidents and resulting injuries. In the erection and maintenance of their poles, wires, and other appliances, they are bound to anticipate only such combinations of circumstances and accidents and injuries therefrom as they may reasonably forecast as likely to happen, taking into account their own past experience and the experience and practice of others in similar situations, together with what is inherently probable from the condition of their appliances as they relate to the conduct of their business." 18 Am. Jur., Electricity, § 53, p. 448.

There is no evidence of faulty construction of the power line involved in this case. We accept the theory of the plaintiffs that the property damage sued for was the result of the break in the primary wire caused by the fatigue fracture, as described by the witness Weiland. It is not disputed that the line was constructed with a No. 4 triple-braided, weatherproof, copper wire, which was the proper kind to be used in this type of construction. There is no evidence in this record as to when the line was constructed, or of the age of the wire at the time of the break. There is no evidence of previous breaks in the wire, or of any other indication that the wire was defective. There is no evidence of any circumstances which would require the use of insulated

wire and, consequently, the festooning of the insulation is not evidence of negligence under the facts of this case. Beresford v. Pacific Gas & Electric Co., 45 Cal. 2d 738, 290 P. 2d 498, 54 A. L. R. 2d 910; Hardware Mutual Casualty Co. v. Tampa Electric Co. (Fla.), 60 So. 2d 179, 40 A. L. R. 2d 1293. There is no evidence that the abnormal sag of the wire in any manner contributed to the breaking of the wire. Interstate Power Co. v. Thomas, 51 F. 2d 964. The festooning of the insulation on the wire and the sag in the wire testified to, not being shown to have contributed to the breaking of the wire, are not a proximate or efficient cause thereof, and can afford no basis for recovery. Heidt v. Southern Telephone & Telegraph Co., 122 Ga. 474, 50 S. E. 361.

We point out also that there is no evidence that the defendant had any reasonable or practical means of locating the defective place in the line prior to its break, or that it had any knowledge of the defect. It is not shown that any special equipment existed that is of general use in the trade, which would have revealed the defect, the nonuse of which would amount to a failure to properly maintain the line in the exercise of due care.

There is evidence that the line, due to the unusual condition of the weather, had accumulated as much as 1 inch of ice, although the amount of the ice on the wire was in dispute. The ice on the wire and the weather conditions which produced it were undoubtedly contributing factors. The severity of the storm and its resulting effects are not alleged to be a proximate cause of the break in the wire, although they were admittedly a contributing factor.

We have come to the conclusion that a fatigue fracture such as described by the witness Weiland, which plaintiffs assert as the cause of the break, does not constitute proof of negligence. To so hold would make

the defendant an insurer against accident, which it is not.

It is contended that defendant was negligent in not properly inspecting the line in order to guard against defects. The local representative of defendant testified that he frequently patrolled these particular lines and that he observed nothing to indicate any defect in them. It is not urged that defendant was required to inspect otherwise than by visual observation on ground patrol. Plaintiffs' expert indicated that ground observation should reveal suspicious areas requiring close inspection. He did not testify that there was a suspicious area near the point of the break which a reasonable inspection should have detected. He only suggested it as a possibility which does not sustain a basis of recovery. There is no evidence that the place of the break was in an area that the witness considered suspicious. It seems to us that it would be unreasonable to require an inspection that would reveal a fatigue fracture which the witness was able to detect only with a high-powered microscope. To impose such a duty of inspection upon electric companies would be the equivadent of making them insurers against injury.

It is well established that when one relies upon pleaded acts of negligence as a basis of recovery, such acts must be proved, or be reasonably inferable from established facts. Under such circumstances negligence will not be presumed. We fail to find evidence of any act of the defendant the doing of which was negligence; nor do we find evidence of the failure to do some act which amounted to negligence.

Misfortunes do occur which result from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective and break, when no human skill could reasonably be expected to detect it. Such accidents, unaccompanied by any negligence on the part of an electric company, can afford no basis for a re-

covery. Only insurers against injury are liable for injuries resulting from such accidents. The only exception to this rule, if it may be called an exception, is where the facts are such as to result in an inference of negligence under the rule of res ipsa loquitur.

We necessarily conclude that negligence on the part of the defendant was not established in the respects charged and that the trial court erred in not sustaining defendant's motions for directed verdicts at the close of all the evidence. The judgments of the district court are reversed and the causes remanded with directions to sustain defendant's motions for judgments notwithstanding the verdicts of the jury.

REVERSED AND REMANDED.

JOSEPH BARKER, JR., EXECUTOR OF THE ESTATE OF ELIZABETH A. BARKER, DECEASED, APPELLANT, V. THE WARDENS AND VESTRYMEN OF ST. BARNABAS CHURCH, APPELLEE.

106 N. W. 2d 858

Filed January 6, 1961. No. 34866.

1. **Appeal and Error.** Where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal here the successful party in the trial court has the duty to point out here the reason or reasons which he contends justifies the decision of the trial court.
2. **Assumpsit, Action of.** Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit.
3. **Money Received.** An action for money had and received is an action at law.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded.*

Kennedy, Holland, DeLacy & Svoboda and *J. A. C. Kennedy, Jr.*, for appellant.

Gross, Welch, Vinardi, Kauffman & Schatz, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an action which began in the municipal court of the city of Omaha. It resulted in a judgment for the plaintiff. Defendant appealed to the district court. Plaintiff filed his petition in the district court. Defendant moved to dismiss "for the reason that the court has no jurisdiction of the subject matter of this cause." The trial court sustained the motion and dismissed the cause without prejudice. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause for further proceedings.

The trial court gave no reason for its ruling and none appears in the transcript.

In Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, we held: "If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions."

This has been repeatedly followed as late as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579. The reasoning of that rule is that where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal here the successful party in the trial court has the duty to point out here the reason or reasons which he contends justifies the decision of the trial court.

Defendant as appellee undertakes to do that here.

Plaintiff, in his petition in the district court on appeal, alleged that he was the executor of the estate of Elizabeth A. Barker, deceased; that defendant is a legal entity formed under Chapter 21, article 8, R. R. S. 1943; that in 1950 and 1951 a "St. Barnabas Church New Building Fund" drive was conducted for the purpose of acquiring another site and erecting a new church building; that substantial contributions were made to the fund, among others a $1,000 gift by Elizabeth A. Barker; that a site was purchased with part of the fund so raised; that in 1957 it was decided that the new site be sold; that it was done at a profit of $24,000; that on request the contributors would be reimbursed their contributions; and that the funds remaining should be spent for repairs and improvements of the "present church building" and for establishing and maintaining a parochial mission. Plaintiff further alleged that he had made request for the return of the $1,000 and that the request had been refused. He prayed for judgment for $1,000 and costs of this action.

So far as the transcript shows this petition and the motion above recited set out the only issues presented to the trial court.

Defendant as appellee here contends that the trial court's appellate jurisdiction is limited to that of the municipal court of Omaha; and that the present action is equitable in nature, being an effort to establish a resulting trust to which the cy pres doctrine applies.

When this action began, section 26-117, R. R. S. 1943, provided that: "The municipal court shall have jurisdiction in all civil cases where the sum in question does not exceed one thousand dollars * * *" except in certain cases not involved here.

Defendant's contention then rests basically on the contention that the action in the municipal court was one in equity; that the municipal court does not have equitable powers and hence was without jurisdiction

of the subject matter; and that the district court on appeal had no jurisdiction.

The transcript does not set out the pleadings in the municipal court. So far as it does refer to the issues tried and decided in the municipal court, the record is exactly to the contrary of appellee's contention.

The transcript from the municipal court shows: "December 16, 1958 Filed Petition. Petition prays for judgment in the sum of $1,000.00, and costs. Due for money had and received." It shows also: "January 29, 1959 Filed Answer." It then recites: October 22, 1959 At 2 P.M. this case as (sic) tried August 6, 1959 and thereafter briefs submitted. On consideration of the pleadings evidence and agruments (sic) the court finds in favor of the plaintiff and against the defendants, and that there is due the plaintiff from the defendants the sum of $1000.00 and costs.

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of and from the defendants the sum of $1000.00, with interest at 6% from date hereof and also their costs herein expended taxed at $3.45."

From that judgment the appeal was taken to the district court.

There is no contention that the amount of the judgment was in excess of the jurisdictional amount of a municipal court judgment. The transcript then shows that the action in the municipal court was one for money had and received.

In School District No. 34 v. Thompson, 51 Neb. 857, 71 N. W. 728, we held with reference to an action for money had and received: "While this form of proceeding has been abolished by the Code, the substantive legal principle on which the action was based still exists, and by that principle the action lies in any case where the defendant has obtained possession of money which ex aequo et bono he ought to refund."

This was followed in McCormick Harvesting Machine Co. v. Stires, 68 Neb. 432, 94 N. W. 629.

In Estate of Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792, we held: Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. The rule is again stated in Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753. The rule was again stated in Boman v. Olson, 158 Neb. 636, 64 N. W. 2d 310, where we also said: "The action, though falling under the common-law class of assumpsit, is really in the nature of a bill in equity and lies wherever the party should by equity and natural principles of justice refund the money."

An action for money had and received is an action at law. 58 C. J. S., Money Received, § 1, p. 906; 4 Am. Jur., Assumpsit, § 20, p. 508. It follows that the trial court was in error in dismissing the cause.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM D. P. CAREY ET AL., APPELLANTS, V. FRANK E. HUMPHRIES ET AL., APPELLEES.
107 N. W. 2d 20

Filed January 13, 1961. No. 34789.

1. **Appeal and Error.** A consideration by this court of a cause on appeal is limited to errors assigned and discussed, except the court may at its option note a plain error not assigned.
2. **Partnership: Joint Adventures.** To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist.
3. **Joint Adventures.** A joint adventure is in the nature of a partnership and exists when two or more persons contribute cash,

labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions.

4. ———. To constitute a joint adventure there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.

5. ———. The existence of a joint adventure is a question of fact and the burden of establishing it is on the litigant who asserts its existence, and more evidence is required to prove the existence of a joint adventure if alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers.

6. Brokers. A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern.

7. Joint Adventures. The generally recognized equitable principle is that persons engaged in a common enterprise by way of a joint adventure or other similar association of persons stand, within the scope of the enterprise with respect to the property related to or employed in the enterprise or to matters pertaining to the enterprise, in a fiduciary relation each to the other and are bound by strict standards of good conduct and fair dealing the one to the other.

8. ———. However, it is generally recognized that if a joint adventure or a like association of persons is formed for the acquisition, ownership, or development of certain defined property, the equitable rule above referred to will not be extended so as to forbid the acquisition, ownership, or development by one of the parties for his own benefit of property not owned by or concerned in the enterprise and which is outside of its scope.

9. Trusts. The burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing.

10. ———. A constructive trust is a relationship with respect to property subjecting the person by whom the title is held to an equitable duty to convey it to another on the ground that an acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

11. ———. The law is that each case in which it is sought to es-

tablish a constructive trust must be determined from its facts and circumstances.

APPEAL from the district court for Kimball County: JOHN H. KUNS, JUDGE. *Affirmed.*

Halcomb, O'Brien & Everson, for appellants.

Van Steenberg, Myers & Burke and *Baker & Smart*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Magnolia Petroleum Company, hereafter called Magnolia, was the owner of oil and gas leases covering the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, together with other lands not involved in this litigation. Magnolia proposed in writing to Dan Reinfried, designated herein Reinfried, that if he would commence on or before a stated date the drilling of an oil well to be located at a described location on Lot 3; would prosecute the drilling of the well with due diligence to a depth sufficient to test to the satisfaction of Magnolia the Skull Creek shale at an estimated depth of 6,700 feet unless oil or gas was produced in paying quantities at a lesser distance; would fully comply with all other provisions of the writing; and would complete the well within a reasonable time not later than 60 days from the date of the commencement of it, Magnolia would assign to Reinfried the described oil and gas leases to the extent and insofar as they covered the above specifically described land of about 240 acres more or less. The writing containing the offer of Magnolia to Reinfried stated it was not binding upon Magnolia until it was accepted by Reinfried as it was submitted to him as evidenced by

his signature subscribed thereon and its return to Magnolia within 15 days from the date of the writing; and upon Reinfried's signing and returning it and three copies thereof within that time, the writing would constitute a valid and binding contract between Reinfried and Magnolia. Reinfried signed the writing under the words endorsed thereon: "ACCEPTED in all its terms and conditions, this 28 day of January, 1958." The offer made by Magnolia to Reinfried as stated above was subject to other definitely stated conditions and obligations not necessary to be recited herein because none of them are involved in this litigation.

Later Sinclair Oil & Gas Company, designated hereafter as Sinclair, offered Reinfried by an instrument designated "Acreage Contribution Agreement. Our Lease No. 132 Kimball County, Nebraska" that if he commenced operations for the drilling of a well for oil and gas on or before a date stated upon a described location identical with the one designated by Magnolia and drilled it with due diligence to a depth sufficient to test the top of the Skull Creek formation anticipated in this vicinity at approximately 6,650 feet, then, upon being furnished by Reinfried with evidence satisfactory to Sinclair that such test well had been so commenced, drilled, and finally completed either as a producing well or plugged and abandoned as a dry hole on or before May 15, 1958, Sinclair would assign to Reinfried all its right, title, and interest in and to the east half of the southeast quarter of Section 17, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska. The offer of Sinclair to Reinfried as above recited was made subject to compliance by the latter with definitely stated conditions not necessary to be set forth herein because none of them are involved in this litigation. The instrument containing the offer of Sinclair to Reinfried provided it should not be binding on Sinclair unless its acceptance by Reinfried was noted on the instrument and it was returned to Sinclair within

15 days from its date. It was accepted and agreed to in writing, endorsed thereon, and signed by Reinfried on the fourth day after its date.

Shell Oil Company, identified herein as Shell, on the date Reinfried accepted the offer of Sinclair above referred to, offered in a writing designated "Dry Hole Contribution" to contribute $6,500 toward the cost of drilling a test well by payment thereof directly to Braden provided the drilling of the well was completed as a dry hole, the test to be commenced not later than a date specified at a described location on Lot 3 and thereafter drilled with due diligence to a depth of 75 feet below the top of the Dakota "J" sandstone or to a depth of 6,760 feet, whichever was first reached. Shell specified its offer was subject to other stated conditions but they are not repeated herein because none of them are involved in this litigation. The writing evidencing the offer of Shell was accepted and acted upon.

The Braden Drilling Company was a partnership. Robert G. Braden, hereafter referred to as Braden, was one of the two members of it. He was an active member of the Kansas Bar; resided and had his office in Wichita, Kansas; and he performed legal services for and participated in the activities of the partnership which maintained an office in Denver, Colorado, in charge of Jerry Slater, hereafter called Slater. Any acreage in the Denver-Julesburg Basin in which the partnership was concerned was held in the name of Braden for its convenience.

A letter was signed and transmitted by Braden to Reinfried in which recitals were made concerning the commitment of Magnolia and Sinclair to assign oil and gas leases to Reinfried and the commitment of Shell to contribute dry-hole money as above stated. The letter of Braden stated that it was to confirm the verbal agreement between him and Reinfried relative to the real estate described in the leases and was in substance as follows: Reinfried agreed to assign the acreage cov-

ered by the leases to Braden and they understood that Reinfried was to receive an overriding royalty equal to 4 percent of seven-eighths working interest in each of the tracts and a cash consideration of $500; that Braden was to receive a full seven-eighths working interest therein burdened only by the overriding royalty of Reinfried; that Braden was to have all the benefits of the dry-hole obligation of Shell as above recited herein, subject to the conditions recited in the agreement concerning it; and that the oil and gas well was to be commenced not later than March 9, 1958. Reinfried was asked by the letter, if it expressed his oral agreement with Braden, to sign and return one copy of the letter and retain the other copy of it. Reinfried attached his signature thereto under the words written on the original of the letter when he received it: "ACCEPTED this 4th day of February, 1958."

The time of the commencement of the oil and gas well was by agreement of the interested parties extended. The drilling equipment was moved to the location of the well not later than April 1, 1958. The drilling of it was finished and it was established as a producing oil well on about April 28, 1958.

There is no claim made in this case that any agreement or obligation of Magnolia, Sinclair, Braden, or Reinfried as hereinbefore recited was not wholly and timely performed and satisfied. Magnolia assigned the oil and gas leases described in its agreement with Reinfried to him as it was obligated thereby to do; likewise Sinclair assigned the oil and gas lease described in its agreement with Reinfried to him as it was obligated thereby to do. Braden paid Reinfried the $500 cash consideration and drilled the well which proved to be an oil-producing one, as his contract with Reinfried obligated Braden to do. Reinfried assigned the oil and gas leases he secured from Magnolia and Sinclair, respectively, to Braden subject to the 4 percent of the seven-eighths overriding royalty retained by Reinfried

as he was obligated to do by the agreement between him and Braden.

The agreement and obligation of Shell concerning the contribution of dry-hole money was wholly annulled and disposed of by the fact that the well drilled by Braden was a producing oil well and was not a dry hole.

Reinfried obtained information in the latter part of June 1958, by happenings hereafter stated, that there was no oil and gas lease covering Lots 1 and 2 of Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska. He secured an oil and gas lease covering the land last described from the owner and her husband under date of July 7, 1958. Reinfried was named as the lessee therein and the lease was soon thereafter filed for record and recorded in the office of the register of deeds of Kimball County, Nebraska. The lease covering the last above-described real estate and an amendment and extension of it were filed on July 23, 1958, and were assigned by the lessee to Frank E. Humphries, B. B. Bradish, and Dan Reinfried, subject to an undivided 4 percent of seven-eighths overriding royalty of all oil and gas produced, saved, and marketed from the acreage described in the lease which was reserved and retained by Reinfried. The assignees named in the assignment of the lease were the members of a partnership organized April 1, 1958.

There were about a score of persons and one partnership named as plaintiffs in this case in the trial court. The record is substantially silent concerning all of them except Robert G. Braden mentioned above and Ray O. Braden, the only members of the Braden Drilling Company, a partnership. Any interest of the individual plaintiffs except Robert G. Braden in the subject of this litigation was derived through Robert G. Braden and is identical in character with his interest. The above-described individuals or any of them did not participate in any way in the negotiations or agreements concerning or the performance of the agreements which

resulted in the drilling of the oil well on Lot 3 above described except Ray O. Braden who was the other member of the Braden Drilling Company. There were several defendants named in this case when it was commenced. All of them except Frank E. Humphries, B. B. Bradish, and Dan Reinfried as individuals and as the only members of the partnership Humphries-Bradish-Reinfried were dismissed from the case and it was dismissed with prejudice as to them before the trial of the case was had. Frank E. Humphries, B. B. Bradish, and Dan Reinfried will be designated as appellees except when they are referred by the surname of the one or ones mentioned. The partnership of Humphries-Bradish-Reinfried will be designated by the word partnership. The plaintiffs in the trial court will be designated appellants.

The amended petition of appellants is long and involved. The substance of the parts of it necessary to be stated to show the basis of the claims of appellants for the relief they seek is as follows: That Braden and Reinfried before January 25, 1958, made an agreement for testing an area surrounding Lot 3, Section 20, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, afterwards referred to as Lot 3, for oil and gas for their mutual benefit and gain which was reduced to writing on January 25, 1958; that appellants, by their representative Slater, requested Reinfried to ascertain by checking the records of Kimball County, Nebraska, and Weld County, Colorado, or by other means, if there was any acreage available to be leased for oil and gas exploration and development within a 1-mile radius of Lot 3; that Reinfried agreed to take suitable steps before the commencement of the proposed test well to ascertain the facts in that regard; that if any acreage was found to be available for leasing, an effort would be made to secure a lease or leases covering it; that if secured appellants and appellees would share in the oil and gas leasehold estates secured on

the same terms as was provided in that respect in the oil and gas leasehold estates referred to in the agreement made by Reinfried and Braden in relation to drilling a well on Lot 3 as hereinbefore stated; that appellants before the commencement of the test well by Braden inquired on occasions of appellees or some of them if they had ascertained if there was any open acreage or oil and gas leases that could be obtained in the area where the well was to be drilled, and appellees or some of them reported to appellants that the checking had not been completed, but assurances were given that it would be accomplished promptly; that appellees advised appellants before the drilling of the test well on Lot 3 was commenced, the exact date of which appellants cannot state, that there was no acreage not leased for oil and gas within a radius of 1 mile of the location where the drilling was proposed and intended to be done; that appellants relied on what they were told or otherwise they would have made a suitable check for open acreage before the drilling of the well was commenced; that a general custom existed in the oil and gas exploration and development industry whereby any person intending to drill a test well for oil and gas refrained from doing so on land adjoining a tract not leased for oil and gas exploration; that appellants knew and appellees knew or should have known of the custom at the times herein concerned; that appellants would not have commenced the drilling of the test well but for the assurances given them by appellees as aforesaid; that Lots 1 and 2 of Section 20 which were immediately east of Lot 3 of that section were in fact not covered by an oil and gas lease at any time before July 7, 1958, which appellees knew before the undertaking was entered upon in reference to the test well on Lot 3 or during the time that undertaking was being carried out, but they or any of them did not report such fact to appellants or any of them; that Reinfried secured an oil and gas lease on Lots 1 and 2 on or about July

7, 1958, which was recorded in the public records of Kimball County, Nebraska, without the knowledge or acquiescence of or any notice to appellants; that appellees violated their duties and obligations to appellants in the following respects: (1) Appellees failed to inform appellants of facts important to the object of their mutual undertaking of which appellees had knowledge before the commencement thereof or during its prosecution; (2) appellees did not properly investigate and ascertain if there was open, unleased acreage for oil and gas exploration and development within a 1-mile radius of Lot 3 before commencement of the test well or if they did they failed to correctly report the true facts to appellants or any of them; (3) appellees did not advise appellants of the fact that Reinfried had acquired an oil and gas lease on Lots 1 and 2; and (4) appellees have assigned the leasehold estate in Lots 1 and 2 created by the oil and gas lease secured thereon by Reinfried to the extent that it is not available to convey to appellants the interest therein they are entitled to have and enjoy.

The amended petition also states that the great cost of drilling a test well for oil and gas on Lot 3 by appellants resulted in an enhancement of the value of an oil and gas leasehold estate as to Lots 1 and 2 and it would be unjust and inequitable if appellants were denied probable and proximate results of their endeavors; that if appellees were permitted to secure a greater portion of the benefits resulting from the undertaking of appellants and appellees than was originally contemplated, an unjust enrichment of appellees would result therefrom; that justice, fairness, and equity require an adjudication that appellees hold all the title and interest in and to the aforementioned oil and gas leasehold estate in Lots 1 and 2 for the use and benefit of appellants; and that substantial quantities of oil have been removed from Lots 1 and 2 and it constitutes a portion of the leasehold estate involved in this litigation.

Appellants ask the court to declare that appellees and each of them hold the right, title, and interest standing in their respective names with reference to the oil and gas leasehold estate created by the lease of July 7, 1958, and the amendment and extension thereof recorded respectively in book 39, pages 621 to 623, and book 39, pages 624 and 625; and in the oil and gas leasehold estate created by the leases described in the written agreement hereinbefore described made by Magnolia and Reinfried recorded in book 1, page 191, and in book 1, page 193, of the public records of Kimball County, Nebraska, so far as the leases cover the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter, Section 17, Township 12 North, Range 56 West of the 6th P. M., Kimball County, Nebraska, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska; and in the oil and gas leasehold estate evidenced by the lease recorded in book 10, pages 213 and 214, of the public records of Kimball County, Nebraska, insofar as it covers the east half of the southeast quarter of said Section 17, in trust for appellants in the proportions set forth in the amended petition, and for such other and further relief as may be just and equitable.

The separate answer of Reinfried, the separate answer of Frank E. Humphries and B. B. Bradish, and the separate answer of the partnership each admitted the agreement entered into by Reinfried and Braden in reference to the drilling of a well on Lot 3 as hereinbefore recited; that the members of the partnership on or about April 1, 1958, entered into an agreement providing that they would thereafter conduct an oil and gas business for the benefit of the three of them in the proportion of one-third to each; that Magnolia and Reinfried, and Sinclair and Reinfried, entered into agreements as hereinbefore stated; that Lots 1 and 2 of Section 20

above described were not covered by any oil and gas lease before July 7, 1958; that Reinfried secured in his name an oil and gas lease covering Lots 1 and 2 on or about July 7, 1958; that an amendment and extension of that oil and gas lease were secured by Reinfried on or about July 21, 1958; and that the oil and gas lease and the amendment and extension thereof were assigned by Reinfried to Frank E. Humphries, B. B. Bradish, and Dan Reinfried. Each of the answers denied all of the statements of the amended petition not admitted. The separate answer of Frank E. Humphries and B. B. Bradish and the separate answer of the partnership contained additional allegations as follows: That on or about April 1, 1958, appellees entered into an agreement by the terms of which they agreed to exchange among each other certain interests in oil and gas leases and thereafter to conduct an oil and gas lease business for the benefit of all of them in a proportion of one-third to each; that assignments of interest in oil and gas leases were made in accordance with the agreement and since that date appellees have each equally shared in the oil and gas business conducted by them; that because of the agreement Reinfried assigned to Frank E. Humphries and B. B. Bradish each a one-fourth of 1 percent of seven-eighths overriding royalty in the oil and gas leases covering the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17, and Lot 3 in Section 20, Township 12 North, Range 56 West of the 6th P. M., in Kimball County, Nebraska; and that prior to the acquisition of the oil and gas lease on Lots 1 and 2 and for some time thereafter appellees or any of them did not know nor did they have reason to know that Braden or his agents claimed to have made an alleged agreement with appellees or any of them employing appellees or any of them to check the records of Kimball County, Nebraska, or Weld County, Colorado, to ascertain if there were any oil and

gas leases available and to ascertain if there was acreage not covered by oil and gas leases within a 1-mile radius of Lot 3. The separate answer of Frank E. Humphries and B. B. Bradish alleged that they were each bona fide purchasers for value of all interest in the oil and gas leases transferred to them by Reinfried and that they and each of them were without notice of any claims of any kind of Braden or his assigns at the time of the acquisition of such interests in the oil and gas leases by B. B. Bradish and Frank E. Humphries.

The reply of appellants to the answers of appellees was a denial of the statements therein inconsistent with the amended petition and an assertion that any interest Reinfried had on or about April 1, 1958, in the west half of the northwest quarter, the west half of the northeast quarter, and the south 58.13 acres of the east half of the southwest quarter of Section 17 was acquired by his participation in the joint venture referred to in the amended petition.

The district court found at the conclusion of the trial of this case generally for appellees and against appellants; that the agreement made by Reinfried and Braden concerning the drilling of a well on Lot 3, appearing in evidence as exhibit No. 1, did not create the relation of principal and broker, principal and agent, or joint adventurers; that there was not at any time any confidential relationship between Reinfried and the plaintiffs (appellants) or any of them or between the other defendants (appellees) and plaintiffs or any of them; that the evidence is insufficient to show any custom creating duties and obligations between Reinfried and plaintiffs or any of them or between the other defendants and the plaintiffs or any of them known to said parties; and that no constructive trust should be imposed upon the defendants' interests in the oil and gas leasehold estates described in the prayer of the plaintiffs' amended petition. A judgment of dismissal of the action was rendered. A motion for a new trial was

denied and this appeal is from that order.

Appellants say that the relationship of Reinfried and appellants in carrying out the project poses the major question. This is equivalent of saying the relationship of Reinfried and Braden in entering into a contract for the drilling of the well on Lot 3, completing it as a producing well, and fully consummating the contract is decisive of this case because none of the other appellants had any negotiations or contract with Reinfried concerning that contract or anything done or accomplished because of it. Any interest or right of those appellants in the subject matter of this case resulted wholly by virtue of what took place between them and Braden to which Reinfried was a total stranger. Appellants characterize the relationship as fiduciary because, as they assert, Reinfried and Braden were thereby engaged in a joint adventure. Braden had no conversation or negotiation with Reinfried concerning the drilling of a well on Lot 3. The negotiations with reference to that were carried on between Reinfried and Slater, an employee of the drilling company who had charge of its Denver office. The first contact of Braden with that transaction was when the letter which later was made the contract between him and Reinfried was submitted to Braden for his examination at Wichita, Kansas. The letter was addressed to Reinfried, was signed by Braden, and he asked Reinfried to accept it by subscribing his signature on the letter if he found it evidenced the true agreement between them in reference to the drilling of the well. It was known and acted upon by both of them that Braden was acting for the Braden Drilling Company and that company did the actual drilling of the well on Lot 3 in performance of the contract of Reinfried and Braden. Much of the property of the Braden Drilling Company was carried in the name of Braden and much of its business was done in the name of Braden for convenience.

Reinfried thought of attempting to put the drilling deal

together which resulted in the oil well on Lot 3 as early as November 1957. He explained the manner of proceeding to put together that kind of a deal by saying that he looked for an area around which wells had been drilled that looked like it might be productive. He then searched for three or more leasehold interests where the acreage was contiguous so that he could acquire a farm out on one leasehold, support from another in the way of acreage contribution or dry-hole money, and the same from other adjacent leaseholders. He secured the information from the Pomco map which he characterized as the working tool of putting together drilling deals. It was 2 months or more after the first contact of Reinfried with a major oil company before he was able to get the farm out from Magnolia, the acreage contribution from Sinclair, and the dry-hole support from Shell of the project concerned in this case. A letter from Magnolia dated January 7, 1958, rejecting the support requested in a proposal made to it by Reinfried and containing a counterproposal by Magnolia of the acreage described in the farm-out letter which became the agreement made by it and Reinfried in reference to a test well on Lot 3 was the first commitment he secured. He then obtained agreements with Sinclair and Shell. Reinfried then had to find someone with whom he could contract to drill the test well on Lot 3.

Slater, who represented the Braden Drilling Company, inquired of Reinfried in January of 1958 if he had any drilling deals. He said he had one and he would be glad to submit it for consideration. He did, included in which was a plat of the farm out and the support acreage which exhibited the acreage in orange on a white background and located it in Township 12 North, Range 56 West, in Kimball County, Nebraska. Later Slater said they were interested in getting the drilling deal but the terms would have to be negotiated. Reinfried asked more than the final agreement which is shown by the contract between Braden and Reinfried

for the drilling of a test well on Lot 3 as hereinbefore stated. Reinfried had his drilling deal formulated and informal commitments of a farm-out acreage from Magnolia, a farm-out contribution, and dry-hole support before he was contacted by Slater. He testified as to what Reinfried offered him: "He had to offer me three 80-acre tracts from Magnolia, one from Sinclair, and some dry hole money from Shell Oil Company, a drilling deal." Slater was asked: "What commitments had to be fulfilled before this acreage could be earned?" He answered: "We were to drill a well in Lot 3, in the approximate center of what would have been a 40-acre tract, section 20." The offer of Reinfried to Slater was expressed in these words by him: "Well, he offered it to me to drill for an override and some cash to him." The written contract between Reinfried and Braden confirms in writing just exactly what Slater says Reinfried had to sell him and the terms under which he bought it from Reinfried.

The status of Reinfried when he was approached by Slater was that Reinfried had by his sole effort formulated a drilling deal. His undertaking was to sell or dispose of it for a monetary consideration and for an overriding royalty. He accomplished this by selling the drilling deal to Braden by a contract which obligated him to pay Reinfried $500 and he was permitted to retain an overriding royalty of 4 percent of seven-eighths of the production of the acreage covered by the leases. The undertaking of Reinfried was also to see that Braden complied with the contract which provided for the drilling of the well the performance of which would be the carrying out by Reinfried of his agreements with Magnolia and Sinclair and thus he would be insured the assignment of the leases from those companies and his overriding royalty. His final undertaking was to secure and receive the assignment of the leases from Magnolia and Sinclair and the making of assignments of them to Braden by Reinfried, reserving

and retaining to him the agreed overriding royalty. Braden had no interest in the drilling deal Reinfried developed until after it had been completely formulated. Braden did not know of the existence of it before that time. He first heard of it after Reinfried had presented it to Slater. The first act of Braden in reference to the drilling deal was when he secured it from Reinfried by contract made by him and Braden upon the terms and conditions evidenced by the contract as previously recited herein. The next act of Braden's undertaking in reference to the proposed well was to pay for the drilling deal which he did by seeking and securing financial assistance from his investors. His next act in the undertaking was to pay Reinfried the $500 as provided in the contract and drill the test well on Lot 3 as required by the contract with Reinfried. His succeeding act concerning the undertaking was to secure the assignment of oil and gas leases from Reinfried to which he was entitled by the contract for the drilling of the well. The final act of Braden was to operate the properties for the benefit of himself and the investors.

It follows that the undertaking and sole concern of Reinfried was to dispose of the drilling deal he had formulated for cash and an overriding royalty. It was the undertaking of Braden to acquire and pay for the drilling deal and to drill a test well on the designated location. The undertaking of each of the parties was different than that of the other. There was no community of interest and common purpose. The interest and purpose of Reinfried was to dispose of the drilling deal he had worked up and to receive cash and override for it. The interest of Braden was to acquire the drilling deal, sell interests to investors to assist in paying for it, pay the monetary consideration for the deal, drill the well, and thereby for himself earn the entire leasehold interest in the properties other than those which he had sold and assigned to investors. It

is clear that the interest and purpose of each were not identical but entirely different. There was not an equal voice in the performance or equal control of or over the agencies of performance. It was entirely in the hands of Braden to drill the test well and Reinfried could do nothing about it but to require Braden to comply with the terms of the contract which provided for the drilling of the well. There was no obligation for the sharing of losses resulting from the drilling of the well by Braden and Reinfried. This is made conclusively clear by the statement in the brief of appellants: "Plaintiffs were to pay actual expenses for test which proved to be $29,395.43 and if test be dry they would receive $6,500.00 which mean (means) an assumed net outlay of $22,895.43 in event of failure of enterprise." In the circumstances of this case there was a failure to establish either a joint undertaking, a community of interest, a common purpose, an equal voice in performance, an equal control of agencies of performance, or a sharing of profits or losses.

In Bank of Cedar Bluffs v. LeGrand, 127 Neb. 183, 254 N. W. 892, this court said: "To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses." In the opinion it is stated: "A joint adventure is in the nature of a partnership and exists when two or more persons contribute cash, labor or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. There is no evidence in this case of any agreement that the profits of the farming and stock-raising business should be divided between the husband and the wife * * * (and) the question of losses was not brought up * * *."

Alexander v. Turner, 139 Neb. 364, 297 N. W. 589, states: "A joint adventure has been defined as an

undertaking by two or more persons to carry out a single business enterprise for profit."

Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368, declares: "To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another." In the opinion it is said: "And the absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist."

In Rossbach v. Bilby, 155 Neb. 575, 52 N. W. 2d 747, the following is stated in the opinion: "The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff." See, also, Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77; Lyhane v. Durtschi, 144 Neb. 256, 13 N. W. 2d 130.

The argument that the relationship of Reinfried and Braden in reference to the enterprise of drilling a well on Lot 3 was a joint adventure is not sustained by the evidence and cannot be accepted.

Appellants argue that the status of Reinfried during his acts relating to obtaining the drilling of the test well on Lot 3 was that of a broker. This argument of appellants is based on a statement in a letter that he wrote to a representative of Sinclair in which Reinfried referred to himself as broker and on the basis that Slater in his testimony spoke of Reinfried as a broker. The letter mentioned above was not on the subject of the test well on Lot 3 but concerned another proposed

enterprise and was contained in only an incidental remark. The terminology by which a layman describes the activities of another is not always accurate and may not be indicative of the truth. In 8 Am. Jur., Brokers, § 2, p. 989, the author defines a broker in this manner: "As generally defined, a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, real or personal, the custody of which is not intrusted to him for the purpose of discharging his agency. Brokers have also been defined as those who are engaged for others in the negotiation of contracts relative to property with the custody of which they have no concern. They act as negotiators in bringing other persons together to bargain * * *."

In 12 C. J. S., Brokers, § 1, p. 5, it is stated: "A broker is one who is engaged for others, on a commission, in negotiating contracts relative to property with the custody of which he has no concern * * *."

In Gile v. Tsutakawa, 109 Wash. 366, 187 P. 323, it is said: "A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern." See, also, Rodman v. Manning, 53 Ore. 336, 99 P. 657, 20 L. R. A. N. S. 1158; French v. City of Toledo, 81 Ohio St. 160, 90 N. E. 160, 25 L. R. A. N. S. 748; Turner v. Crumpton & Crumpton, 21 N. D. 294, 130 N. W. 937, Ann. Cas. 1913C 1015.

The facts in this case which exhibit in detail the acts of Reinfried and the written agreements which fully express the facts of his entire conduct in reference to the exploration for oil on Lot 3 condemn the argument of appellants that he acted as a broker for anyone in reference to that enterprise. Reinfried acted as a principal concerning it. He was not an agent or

representative of anyone in disposing of the drilling deal to Braden. Reinfried acted only for himself in securing the leases and the dry-hole money and after he had assembled the drilling deal he disposed of it to Braden while acting independently and entirely for himself. Reinfried continued to act only for himself until his contract with Braden was fully completed. This contention of appellants is entirely without foundation.

The record does not support the assignment of error that the district court erred in holding that appellants pursued the wrong remedy in this case or the assignment of error that the trial court erred in refusing to "require correction as to interest assigned in leasehold, particularly as to East Half of Southeast Quarter of Section 17." There is no showing exhibited by the record that the trial court did hold that appellants pursued the wrong remedy. It is impossible to determine to what the second assignment noted above referred. The pleadings of appellants contain no basis for such correction or reformation. The prayer of the amended petition seeks no such relief. The briefs of appellants contain no discussion of the alleged error. Neither of these assignments presents anything this court can consider. Schaffer v. Strauss Bros., 164 Neb. 773, 83 N. W. 2d 543.

Appellants allege in their amended petition that there was a general custom in the oil and gas exploration and development industry whereby any person intending to drill a test well for oil and gas refrained from doing so on a location adjoining a tract of land not leased for oil and gas exploration. Appellants attempted to prove the existence of the alleged custom and that appellees knew or should have known of it before the well was commenced on Lot 3. The district court made a specific finding against appellants as to that claim. There is no assignment of error by appellants that the finding in that regard was incorrect, neither is the matter dis-

cussed in the brief on this appeal. There is, therefore, nothing this court may consider in regard to the alleged custom. Schaffer v. Strauss Bros., *supra.*

The proof offered by appellants in reference to their claim that Reinfried, or Reinfried and Humphries, were engaged by Slater, acting for Braden, to check the area around Lot 3 before the test well was commenced to ascertain if there was any acreage that was not covered by an oil and gas lease was only the testimony of Slater as follows: Sometime in between the time that the well was drilled he asked Reinfried and Humphries to check the acreage around the thing within 1 mile of that location. He could not give the dates but he said he instructed them several times before the rig was moved on the location. He later testified he asked Reinfried to check the records for the witness to see if there was any area unleased and that was at the time the agreement between Reinfried and Braden for the drilling of the well on Lot 3 was actually being reduced to writing and that Reinfried then said he would do that. Slater said that happened when the negotiations (for drilling the well) were being completed and that was the first time he had instructed it (checking the records by Reinfried). Witness was specifically asked: "* * * the first time was the time that you and Mr. Reinfried were formally reducing your agreement to writing?" The witness answered the question in the affirmative. The witness during the negotiations he had with Reinfried concerning the drilling of the well was acting on behalf of the Braden Drilling Company. Subsequently in his testimony he stated that he contacted Humphries and Reinfried not personally but by telephone, but he did not know when the first instance was that he told them to check those (records) and they agreed to do it but around the time the rig was moved on location on Lot 3 they told witness they had done it. Witness then changed "they" to "Reinfried" and said he told the witness that he,

Reinfried, had checked the records and there was no open acreage. Thereafter during the examination of the witness he said he hired Reinfried and Humphries to do day work after Braden agreed to drill it just as he hired all these brokers to check this acreage for him but there was nothing mentioned about compensation. He said the usual compensation for checking records in that area was from $25 to $50 per day and that generally when he had such work to do he employed a person who was experienced in checking records. The witness finally said there was no agreement to pay Reinfried or Humphries any monetary compensation for checking the records as the witness allegedly requested but they were to get their pay for that work from 4 percent of seven-eighths overriding royalty realized from any new lease they secured on land they found was subject to lease while they were checking the record under the arrangement made with them by Slater.

The assertion that Reinfried, or Reinfried and Humphries, were solicited or employed to make an investigation as to unleased acreage around the drill site of the test well on Lot 3 was unqualifiedly denied by them. Reinfried testified that from the time he first mentioned the drilling deal concerning the proposed test well on Lot 3 until after the well was drilled and completed, Slater made no request to Reinfried to check any acreage for Slater, and Reinfried first learned that Slater claimed that he requested Reinfried to check the area around Lot 3 in August 1958. Humphries while a witness said that he had no conversation with Slater concerning anything connected with the well which was drilled on Lot 3 until sometime in the month of August 1958, after he had heard that Slater was claiming that he had instructed Humphries to check the records for unleased acreage around Lot 3. The witness first knew this claim was in fact made when it was asserted by Slater in August 1958, when Hum-

phries was in the office of Slater. Humphries denied that he was at any time asked or instructed by Slater to check any records for open or unleased acreage around the site where the test well was drilled.

The testimony of Slater concerning the subject that he asked Reinfried to check the records for Slater to ascertain if there was any area unleased around where the test well was proposed to be drilled was that he did that at the time the agreement between Reinfried and Braden for the drilling of the well was actually being reduced to writing and that Reinfried said he would make such a check. Slater said the request was made by him and accepted by Reinfried when the negotiations for the agreement were being completed and that was the first time the subject was discussed. Slater conducted all the negotiations between his employer, the Braden Drilling Company, and Reinfried in reference to the drilling contract between them which was reduced to writing and executed by Braden for his company and Reinfried for himself. The writing which became the evidence of the drilling contract was made in the Denver office of the Braden Drilling Company which was managed by Slater. It bears date of January 25, 1958. After it was prepared it was sent to Braden at Wichita, Kansas, for his attention. He signed and transmitted it to Reinfried who executed it 1 week later. The writing became a complete contract. It specified in detail the obligations of each of the parties to it. It was delivered, became effective, and was fully performed according to its terms. It contained no provision obligating Reinfried to do any checking or investigating concerning any land. The real estate covered by the oil and gas leases involved in the transaction were precisely described in the written agreement, and Lots 1 and 2 of Section 20 were not mentioned. Those lots were entirely excluded and were wholly unconcerned in the transaction. Braden sought, obtained, retained, and acted upon writings from Rein-

fried, which were composed and written by Slater, concerning modifications of the well-drilling contract in respect to the time of the commencement date of the well. These writings expressly affirmed all other terms and provisions of the drilling contract and stated they should remain as they were originally written. The last of these writings was more than a month after the drilling agreement was prepared but no effort was made to add to it a provision concerning checking for unleased areas around the drilling site. These facts detract from the quality of the testimony of Slater.

In another part of his testimony Slater said he asked Reinfried and Humphries to check the acreage around the location of the well and to purchase any lease they could obtain on any unleased land they found; that Braden would buy the lease; and that Reinfried and Humphries would receive their override the same as they did in the original deal. Slater did not tell them how much they could pay for a lease on any new acreage. The witness stated he instructed them in this regard several times. He could not state the dates this was done but did say it was before the rig was on location.

Humphries was not interested in any manner in the drilling deal concerning a test well on Lot 3. He did not claim nor was he entitled to any override involved in that enterprise. Humphries had no business transaction with Reinfried concerning any oil business such as is involved in this case at or prior to the time designated by Slater as before the rig was moved on location. In fact Humphries had no business transaction with Reinfried except they each paid one-half of the expense of the office space they respectively occupied but each had and conducted his own separate business and neither had any interest in the business of the other before April 1, 1958, at which time the partnership of Humphries-Bradish-Reinfried was organized. Humphries had no specific information about the drilling

deal of Reinfried described herein at the time last above designated by Slater. It was not at all probable that Humphries would have obligated himself to check the acreage within a given radius of a specified location when he had no interest in and only slight information of the transaction involved and could not profit therefrom. Humphries did not claim any skill for or experience in that kind of investigation work. Slater said it had been the previous practice of Braden Drilling Company when it had checking of public records to be done to employ an experienced person in that field to do it, generally on the basis of day work at an expense of from $25 to $50 per day.

Slater further testified he contacted Reinfried and Humphries concerning checking the area around Lot 3 when the deal was consummated in February. Soon after making that statement Slater said that Reinfried was employed by Braden to check the acreage around the location of the test well; that he was to be compensated for his employment by day work; and that he, Slater, would not have been surprised if Reinfried did not ever send him, Slater, a bill for it. When Slater was asked the exact terms of the hiring by him of Reinfried and Humphries he said they were hired just like all those brokers. He asked them if they would check this acreage for him and they said they would. There was nothing mentioned about the compensation that would be paid. Slater was asked if Reinfried was to do the checking for nothing and he said: "I don't know, there wasn't anything talked about it, but they could have sent me a bill, they could not have sent me a bill. I've done things for people at times that I've turned deals to as a favor without ever billing them for it." The testimony of Slater on the subject discussed above was equivocal, uncertain, unsatisfactory, and in some respects contradictory. It was not of the quality required to even tend to show, much less to establish,

justification for a finding of or a decree for the imposition of a constructive trust.

It is and has been the consistent doctrine of this court that the burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing. Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786; Bailey v. Karnopp, 170 Neb. 836, 104 N. W. 2d 417.

There is a fact in the record which indicates that Braden or Slater did not think that checking for unleased land near Lot 3 was of such tremendous importance when the drilling contract was being negotiated and consummated as they have attempted to make it appear in this litigation. The fact is that Braden had and examined abstracts of title to the land actually involved in the drilling deal concerning Lot 3 and the abstracts he was furnished covered the title to Lots 1 and 2 adjoining Lot 3. Braden was asked this question: "Then, you are prepared to make the flat statement that some of the abstracts did cover Lots 1 and 2?" The answer of Braden was an unqualified "Yes." Braden did not say he examined the abstract to Lots 1 and 2 but he had an opportunity to do so. It may be that Slater and Braden relied on the Pomco map which showed that Magnolia had a lease on Lots 1 and 2 when the drilling contract was negotiated and consummated just as Reinfried did. It could be that the idea that Reinfried would do the checking for unleased land was an afterthought when it was learned that he had secured a lease on Lots 1 and 2 and Slater was proclaiming by telephone and otherwise that there was sure to be a lawsuit involving that lease.

Appellants contend that all contacts in carrying out the terms of the contracts with Magnolia and Sinclair on the one hand and Braden on the other hand were handled through Reinfried and because of this he stood in a fiduciary relationship. The record does not sustain this. The fact as established by the record is the

very antithesis of this contention. All the instruments and writings between Reinfried and Magnolia and Sinclair are in evidence and there is nothing in them showing any communications from Reinfried to either of the oil companies in reference to any of the matters required by the contracts with them and there was no offer of proof of any communication other than what is contained in the contracts concerning what the companies should do. The record shows that each of the participants in arranging for and accomplishing the drilling of a test well knew exactly what the facts were, what each was obligated to do, and what each was to receive if the enterprise was successful in producing an oil well or if the result proved to be a dry hole. Each of the participants acted independently and at arm's length with each other. Each was bound by a definite, complete, and clear written agreement and the provisions of each of the contracts were fully performed. The agreement between Reinfried and Magnolia was dictated and written by the latter and the farm out was definitely described therein. It did not include Lots 1 and 2 and there is no claim that anyone interested in the exploration for oil understood that it did. That agreement was the measure of the rights and obligations of the parties to it. The acreage contribution agreement between Sinclair and Reinfried was prepared by Sinclair and it definitely described the land covered by the lease. It was contributing to support the farm out made by Magnolia as assistance in having a test well drilled on Lot 3. That agreement was the measure of the rights and obligations of the parties to it. Shell, at the solicitation of Reinfried, made a dry-hole commitment to assist in having a test made on Lot 3 but Shell insisted that the amount thereof be paid, if and when the conditions of the commitment were complied with, directly to Braden. Hence the contract concerning it was made by Shell and Braden and it fixed the rights and obligations of the parties in

reference to that contribution. The contract between Reinfried and Braden for the drilling of the well on Lot 3 was complete, definite, and unambiguous in providing for the rights and obligations of the parties to it. It described by legal description the land covered by the leases contributed by Magnolia and Sinclair and it described the dry-hole contribution of Shell. There was no requirement, place, or function for an intermediary between the parties or any of them who were participating in this enterprise. The rights and obligations of each were contractual and no one of them acted for or represented any of the others except to perform the contract or contracts by which he was bound.

Reinfried depended upon the correctness of the representations of the Pomco map to the effect that the land around Lot 3 was covered by oil and gas leases. This, according to the record, is the practice generally among persons engaged in the exploration and development of the oil industry unless there is something which appears to challenge the correctness of the map. An inquiry by a representative of Sinclair to Reinfried late in June or early in July 1958, after the oil well on Lot 3 had been completed, resulted in the latter telling the former that the map showed that Magnolia had a lease on Lots 1 and 2. Later the representative told Reinfried that Magnolia reported it did not have such a lease. Reinfried then inquired of Shell if it had a lease on the lots and he was advised that Shell did not. Reinfried then investigated at Kimball and satisfied himself that Lots 1 and 2 were not leased for oil and gas exploration. He secured such a lease thereon which was dated July 7, 1958. He took the lease in his name and recorded it in the public records of Kimball County. It is not important how he became advised that Lots 1 and 2 were not covered by an oil and gas lease. What is important and decisive is that there was no relationship between any of the

appellants and any of the appellees which required the latter to share the lease on Lots 1 and 2 with appellants. The object of this litigation is in effect to have Lots 1 and 2 added to the description of the real estate described in the drilling contract made by Braden and Reinfried under the terms of which the oil well on Lot 3 was drilled.

If there had been a fiduciary relationship between Reinfried and the appellants or any of them, this fact would not, under the circumstances of this case, necessarily entitle appellants to an adjudication of a constructive trust.

In Warner v. Winn, 145 Tex. 302, 197 S. W. 2d 338, the court said: "A contract which provided for the development of certain specified and carefully described areas, held under named and well defined leases for the production and sale of gas from those tracts, constituted the full agreement between the parties, and the equitable rule that persons engaged in a common enterprise by way of joint adventure stand, within the scope of the enterprise, in a fiduciary relation each to the other, will not be extended so as to forbid the acquisition, ownership or development by one of the parties for his own benefit of property not embraced in the enterprise and outside of the scope of the contract. * * * To invoke the equitable rule that persons engaged in a joint enterprise stand in a fiduciary relation to each other and be bound by the strict standards of good conduct and fair dealing with each other, there must be some act showing the intention of one or the other of the parties to acquire, for his own benefit, property belonging to the joint enterprise, to use the funds of such enterprise for his own gain."

In British American Oil Producing Co. v. Midway Oil Co., 183 Okl. 475, 82 P. 2d 1049, it is stated: "The plaintiff discusses at length the rules applicable to a fiduciary relationship, the duties of a trustee to his cestui que trust, and the requirements of loyalty to a coadventurer.

Those principles apply here, but only as applied to the property involved and the existing property rights. Here each party owed a high degree of loyalty to the other, as applied, however, to the assembling of leases and the drilling and developing of the specified area involved, and the further duty of faithfully accounting for the income. As to those matters, the parties did not deal at arm's length, but trusted and relied upon each other. British American owed to Midway a high degree of loyalty, diligence, and fidelity, and that will not consciously be lowered by any judgment of this court. But when every such duty has been discharged in full, no court has the right to enlarge the duty of British American and create new rights in Midway by decreeing to Midway a share of profits made by British American from a private risk in a separate enterprise. This cannot be fairly done even in the name of a fiduciary relationship, or a trust relationship, however sacred in the law are those relationships, and the duties and rights arising therefrom when properly analyzed, applied, and enforced."

The relief appellants seek in this litigation is that the court impose a constructive trust upon the interest of appellees in the property described in the prayer of the amended petition of appellants.

In Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, this court said: "A constructive trust is a relationship with respect to property subjecting the person by whom the title is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property. * * * The law is well established that each case is to be determined from the facts, circumstances, and conditions, as presented therein." See, also, Wiskocil v. Kliment, *supra;* Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

This is an equity case and the trial in this court is

de novo. Wiskocil v. Kliment, *supra;* Bailey v. Karnopp, *supra.* The evidence is not of the quality required to establish a case justifying the imposition of a constructive trust in favor of appellants in respect to the property involved. The judgment should be and it is affirmed.

AFFIRMED.

Note: This opinion was adopted by the court on January 3, 1961.

METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
107 N. W. 2d 397

Filed January 27, 1961. No. 34913.

1. **Municipal Corporations.** A public sewer system is a public utility; a municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and doing so relates to a matter of state-wide concern.
2. **Judgments.** Where there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable.
3. **Constitutional Law.** Before a law can be determined unconstitutional, the express provision of our Constitution which the law contravenes must be pointed out.
4. **Constitutional Law: Statutes.** Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so.
5. **Statutes: Municipal Corporations.** Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed.
6. **Municipal Corporations.** Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated

to them, or such as may be inferred from some express delegated power essential to give effect to that power.

7. **Statutes.** In case of doubt as to the meaning of a statute resort may be had to the title of the act as an aid to discover the legislative intent but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.
8. ———. If words of a statute are of doubtful meaning they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. The intention of the Legislature, when ascertained, will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment.
9. **Public Utilities: Municipal Corporations.** A public sewer system is a public utility the same as a water system and the Legislature would have the right to delegate to a municipal corporation the authority to manage and operate the same, or any phase thereof.
10. **Statutes.** The power of classification rests with the Legislature and this power cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by an artificial and baseless classification, attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation.
11. **Municipal Corporations.** A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed as modified.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellant.

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This action was instituted in the district court for

Douglas County by the Metropolitan Utilities District, a municipal corporation to which we shall hereinafter refer as the district, against the City of Omaha, a municipal corporation to which we shall hereinafter refer as the city. The action is in the nature of a declaratory judgment suit and was brought for the purpose of determining the validity of a contract entered into between the district and the city whereby the district agreed to collect for and remit to the city the sewer service charges which the city, by ordinance, had imposed upon those using its sewer system and, if valid, to determine the rights, powers, duties, and obligations of the parties thereunder. The trial court held the legislative act, under and pursuant to which the parties had entered into the contract herein involved, unconstitutional in certain respects and, because other statutory requirements imposed upon the district had not been properly complied with, that the contract was inoperative and without force and effect. The city thereupon filed a motion for new trial and this appeal was taken from the overruling thereof.

The district has exclusive management and control of the water and gas systems serving the city and surrounding territory. The city is of the metropolitan class governed by a home rule charter adopted by its electorate on November 6, 1956. It has the exclusive management and control of the sewer system of the city. After the 1959 Legislature had adopted L. B. 295 on June 9, 1959, with an emergency clause, the district and city did, on March 2, 1960, enter into the agreement hereinbefore referred to. By its ordinance No. 21141, passed on December 29, 1959, the city fixed the rates which the users of its sewer system were to pay and which, under its contract with the city, which ordinance No. 21141 authorized, the district agreed to collect. The parties to the contract are unable to agree as to their respective rights, powers, duties, and liabilities thereunder and under the statutes of the state

and ordinances of the city applicable thereto. In view of that fact they seek, as the contract provides they shall, to have the validity and enforcibility thereof judicially determined before they put the contract into effect by operating thereunder.

The action involves a question as to the constitutionality of a statute. Consequently, since declaratory relief is sought, copies of the proceedings were served on the Attorney General of the state. See § 25-21,159, R. R. S. 1943. However, no appearance was made in the action by the Attorney General either in the court below or in this court.

A public sewer system is a public utility; a municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and doing so relates to a matter of state-wide concern. Michelson v. City of Grand Island, 154 Neb. 654, 48 N. W. 2d 769, 26 A. L. R. 2d 1346.

Where, as here, there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable. See, Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. The action being equitable in its nature we shall consider the cause de novo. State Farm Mutual Automobile Ins. Co. v. Kersey, *ante* p. 212, 106 N. W. 2d 31.

The questions raised involve the constitutionality of certain statutes; the construction thereof as well as of ordinance No. 21141 passed by the city under and pursuant thereto; the authority of the district and city thereunder; and the construction of such authority. In view thereof we shall set forth certain principles relating thereto before discussing separately the questions raised. Before doing so we will dispose of the city's contention that the question of constitutionality was not properly or sufficiently pleaded as an issue in view

of our holding to the effect that: "* * * before a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out." State ex rel. Miller v. Bryant, 94 Neb. 754, 144 N. W. 804. It is apparent that the constitutional provision relied upon by the district must have been pointed out to the court below, for it passed thereon, and it has been fully and sufficiently called to the attention of this court. We find no merit to this contention made by the city. The burden, in this respect, is upon the party so contending. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so. United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576; Wilson v. Marsh, 162 Neb. 237, 75 N. W. 2d 723; Wagner v. City of Omaha, *supra;* Dorrance v. County of Douglas, 149 Neb. 685, 32 N. W. 2d 202; State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28; Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688; Davis v. State, 51 Neb. 301, 70 N. W. 984.

Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. Starman v. Shirley, 162 Neb. 613, 76 N. W. 2d 749. As therein held: "When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given."

"A district organized under the provisions of articles 10 and 11, ch. 14, Comp. St. 1929 (now Chapter 14, articles 10 and 11, R. R. S. 1943), is a public corporation empowered to perform functions usually performed by

cities of the metropolitan class and is, in its broader sense, a municipal corporation." Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 Neb. 871, 291 N. W. 558.

"Municipal corporations are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power." Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699. See, also, United Community Services v. The Omaha Nat. Bank, *supra*.

"A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted and those essential to the declared objects and purposes of a municipality." Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra*. See, also, United Community Services v. The Omaha Nat. Bank, *supra*.

"* * * legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter." Garver v. City of Humboldt, *supra*. See, also, Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., *supra*.

"The authority given a public corporation to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances." United Community Services v. The Omaha Nat. Bank, *supra*.

The first question raised is, does L. B. 295, as passed

by the 1959 Legislature, authorize and empower the district and city to enter into the contract herein involved? That they followed the necessary legal procedure to do so is evidenced by the record. The trial court held that the act did so authorize and empower. We shall set out so much of the act as is material to this issue, including the title.

"AN ACT * * * relating to sewer rental or use fees in cities of the metropolitan class; to empower and provide that a city of the metropolitan class may enter into a contract with the metropolitan water or metropolitan utilities district serving such city for the purpose of aiding in the collection of any sewer rental or use fee established by such city and to pay the charge therefor; to provide that such a metropolitan water or metropolitan utilities district may by contract provide such services to such city upon payment of the cost thereof, and to terminate water services for nonpayment of such sewer use fee; to provide that such fees shall be charged to the owner of the property served or the person, firm, or corporation using the service; * * *."

"Section 1. In addition to any and all powers granted to metropolitan cities and metropolitan water or metropolitan utilities districts within and serving such cities, a metropolitan city may enter into a contract with the metropolitan water or metropolitan utilities district within its area in order to obtain the use of facilities and services of the water utility of such a district in order to collect all or any part of a sewer use or rental fee which such city may lawfully be entitled to charge and collect.

"Sec. 2. To accomplish the purposes of section 1 of this act, a metropolitan city is empowered to pay such metropolitan water or metropolitan utilities district the charges for such services as set forth in said contract, and such district may discontinue water service to its customers, for failure to pay such sewer rental or use fee.

"Sec. 3. The powers granted in sections 1 and 2 of this act to metropolitan cities, metropolitan water districts and metropolitan utilities districts, are cumulative and not in derogation or amendment of the existing powers of each." Laws 1959, c. 32, p. 186; §§ 1, 2, and 3, now §§ 14-1108, 14-1109, and 14-1110, R. S. Supp., 1959.

We think the language of sections 1, 2, and 3 of the act grants this authority to the district and city. But if there is any question in this regard we think, in view of the record before us, that the following principles, applied thereto, would make that fact abundantly clear.

"In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act." Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582. See, also, McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Nebraska Central Bldg. & Loan Assn. v. Yellowstone, Inc., 141 Neb. 679, 4 N. W. 2d 762; Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217; State ex rel. Marrow v. City of Lincoln, 101 Neb. 57, 162 N. W. 138. As stated in Hansen v. Dakota County, *supra:* "Assuming, for the sake of argument, that the language used in section 7, when considered with other language in the act, results in ambiguity and uncertainty and casts doubt as to what the legislature intended, we may then resort to an examination of the title to the act as an aid to construction."

"If words of a statute are of doubtful meaning, they will be interpreted in a manner which will best effect the purposes of the enactment in preference to one which will defeat it. The intention of the Legislature when ascertained will prevail over the literal sense of the words used and this is especially true when the strict letter of the law would lead to injustice or absurdity. In interpreting a statute the legislative intent may be found from the reason of the enactment." Hal-

stead v. Rozmiarek, 167 Neb. 652, 94 N. W. 2d 37. See, also, Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119; Starman v. Shirley, *supra;* Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359; McConnell v. McCook Nat. Bank, *supra;* Federal Farm Mtg. Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384.

A public sewer system is a public utility the same as a water system, and the Legislature would have the right to delegate to a municipal corporation, here the city and the district, the authority to manage and operate the same or any phase thereof. See, Michelson v. City of Grand Island, *supra;* Laverents v. City of Cheyenne, 67 Wyo. 187, 217 P. 2d 877. But in this respect L. B. 295 is not an original and independent piece of legislation, complete in itself so far as it applies to the subject matter properly embraced within its title. See, Stewart v. Barton, 91 Neb. 96, 135 N. W. 381; Beisner v. Cochran, 138 Neb. 445, 293 N. W. 289. It is legislation which either adds to or takes from the district or the city the right already delegated to it by the Legislature to manage and operate, respectively, the water and sewer systems of Omaha and the surrounding area.

We think the trial court was correct when it held: "Metropolitan Utilities District has been empowered by Chapter 32, Nebraska Session Laws of 1959, approved June 9, 1959, with emergency clause, referred to herein as L. B. 295, to contract with the (city) of Omaha for the collection of sewer use fees which such city may lawfully be entitled to charge and collect." In other words, it gives the district the authority to enter into a contract with the city to use the facilities and services of the water utility, which it (the district) manages and operates, to collect all or any part of a service use or rental fee which the city may lawfully be entitled to charge and collect. Such authority is, however, not mandatory.

The next question to arise is, did the 1959 Legislature, by using the language that it did in amending sections

14-365.03 and 14-365.10, R. R. S. 1943, create a class of sewer users in metropolitan cities, other than those in cities and villages generally, without a proper base therefor such that it creates special class legislation which is prohibited by Article III, section 18, of the Constitution of Nebraska? The trial court held that it did. Its holding in this effect is apparently based on the thought that under sections 18-503, R. R. S. 1943, and 18-509, R. S. Supp., 1959, sewer users who do not own the premises served and who have not requested the service being used are not liable for the use thereof, whereas, sections 14-365.03 and 14-365.10, R. S. Supp., 1959, would subject all sewer users in metropolitan cities to such liability.

The operation of a sewer system, which includes the collection of a fee or service charge for the use thereof, is a matter of state-wide concern and, since the Legislature has entered the field, any attempt of a city to deal therewith contrary to the statutes covering the subject would be without force and effect. See, Michelson v. City of Grand Island, *supra;* Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862; Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540; Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894.

However the Legislature can, in dealing with a matter of state-wide concern, make classification of those subject thereto if a proper basis exists for so doing. See, Omaha Parking Authority v. City of Omaha, *supra;* United Community Services v. The Omaha Nat. Bank, *supra;* Dorrance v. County of Douglas, *supra;* Axberg v. City of Lincoln, *supra;* Galloway v. Wolfe, 117 Neb. 824, 223 N. W. 1, 62 A. L. R. 637; State ex rel. Douglas County v. Frank, 61 Neb. 679, 85 N. W. 956; State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N. W. 941; State ex rel. Jones v. Graham, 16 Neb. 74, 19 N. W. 470. As we held in Cunningham v. Douglas County, 104 Neb. 405, 177 N. W. 742, by quoting from Allan v. Kennard,

81 Neb. 289, 116 N. W. 63: " 'The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation.' "

The question then arises, did the Legislature classify the users of the sewer system in a metropolitan city on a different basis than those in other cities and villages in the state? If it did not classify them differently then there is no necessity for our determining whether or not a proper basis exists for its doing so.

Originally the Legislature dealt with this subject in 1933 when it passed S. F. No. 384. See Laws 1933, c. 146, p. 561, which is now Chapter 18, article 5, R. R. S. 1943. Section 18-503, R. R. S. 1943, thereof provides: "The governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control thereof. The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system by each person, firm or corporation whose premises are served thereby. If the service charge so established is not paid when due, such sum may be recovered by the municipality in an action of assumpsit, or it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes are certified, assessed, collected and returned."

Section 18-509 was enacted by the 1951 and amended by the 1957 session of the Legislature and is now reported as section 18-509, R. S. Supp., 1959. It provides, insofar as here material, as follows: "The mayor and city council of any city or the board of trustees of any village, in addition to other sources of revenue available to the city or village, may by ordinance set up a rental or use charge, to be collected from users

of any system of sewerage, and provide methods for collection thereof. The charges shall be charged to each property served by the sewerage system, shall be a lien upon the property served, and may be collected either from the owner or the person, firm, or corporation requesting the service."

Insofar as cities of the metropolitan class are concerned the Legislature passed a law in 1953 relating thereto. See Laws 1953, c. 24, p. 98. It has become a part of article 3 of Chapter 14, R. R. S. 1943. The 1959 Legislature amended sections 14-365.03 and 14-365.10 thereof. See Laws 1959, c. 32, p. 186. These sections, as amended, are now sections 14-365.03 and 14-365.10, R. S. Supp., 1959.

Section 14-365.03, as amended by the 1959 Legislature, now reads as follows: "The governing body of such municipality may make all necessary rules and regulations governing the use, operation, and control thereof. The governing body may establish just and equitable rates or charges to be paid to it for the use of such disposal plant and sewerage system, including any storm sewer system, by the owner of the property served or by the person, firm, or corporation using the services. If the service charge so established is not paid when due, such sum may be recovered by the municipality in an action of assumpsit, or it may be certified to the tax assessor and assessed against the premises served, and collected or returned in the same manner as other municipal taxes are certified, assessed, collected, and returned."

Section 14-365.10, as amended by the 1959 Legislature, now reads, insofar as here material, as follows: "The mayor and city council of any metropolitan city, in addition to other sources of revenue available to the city, may by ordinance set up a rental or use charge to be collected from users of any system of sewerage, including any storm sewer system, and provide methods of collection thereof. The charges shall be charged to

each property served by the sewerage system, including any storm sewer system, shall be a lien upon the property served, and may be collected either from the owner or the person, firm, or corporation using the service."

Section 18-503, R. R. S. 1943, and section 18-509, R. S. Supp., 1959, permit the governing body of any city or village in the state to establish just and equitable rates or charges, also referred to as rental or use charges, to be paid for the use of any sewer system which it is lawfully operating and that such rental or use charges are to be charged to the premises served thereby but may be collected from either the owner of the premises served or from the person, firm, or corporation "requesting the service."

Sections 14-365.03 and 14-365.10, R. S. Supp., 1959, permit the governing body of any metropolitan city in the state to establish just and equitable rates or charges, also referred to as rental or use charges, to be paid to it for the use of its sewer system and that such rental or use charges are to be charged to each property served but may be collected from either the owner thereof or from the person, firm, or corporation "using the service."

The primary purpose of these statutes is to authorize the governing body of any city or village in the state to make and collect a reasonable rental fee or service charge for the use of any sewer system which it is operating. In each case the statute provides such rental fee or service charge may be charged to the premises served but collected from either the owner or the person, firm, or corporation "requesting the service" or "using the service." We do not think the use of the two words "requesting" and "using" created two distinct classes from whom collection for the use of the sewer may be made. We think "using the service" implies a request was made for that purpose, whereas "requesting the service" implies that it is done for the

purpose of making use thereof. We find that for all practical purposes the two phrases "requesting the service" and "using the service" mean the same thing and should be so construed. In view thereof we find the trial court was in error.

A further question arises, did the Legislature have the right to delegate to the district the authority to cut off the water service of its patrons who fail to pay the sewer service fee or use charge imposed upon them by the city if the district enters into an agreement with the city under and pursuant to ordinance No. 21141. Ordinance No. 21141 was passed by the city under and pursuant to L. B. 295. Section 2 of L. B. 295, hereinbefore set forth, provides in part: "* * * and such district may discontinue water service to its customers, for failure to pay such sewer rental or use fee." In Michelson v. City of Grand Island, *supra,* we held: "The provision of a city ordinance for shutting off water furnished by the city to the premises of the consumer failing to pay sewer service charges is not unconstitutional as depriving persons of property without due process of law, as where water and sewer services are so interlocked neither can be effective without the other.

"A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation, * * *."

We see no good reason why the Legislature, under its plenary powers to regulate and control municipal corporations, could not grant the same authority to municipal corporations that have been given the authority to manage and operate such utilities. We think it can. This case is clearly distinguishable from Garner v. City of Aurora, 149 Neb. 295, 30 N. W. 2d 917, which involved the collection and disposal of garbage, under the principle therein announced as follows: "A public service corporation cannot refuse to furnish its public service

because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service."

Having come to the conclusion that L. B. 295 is constitutional, that ordinance No. 21141, passed by the city under and pursuant thereto, is valid, and that the district and city could lawfully enter into a contract whereby the district could agree to use the facilities and services of its water department to collect and remit the sewer service fee or rental use lawfully imposed by the city, the question arises, was it entered into on a proper basis?

Section 2 of L. B. 295, provides the city is empowered to pay the district "the charges for such services as set forth in said contract" which is referred to in the title of the act as "the cost thereof." However, section 14-1041, R. R. S. 1943, insofar as here material, provides: "A metropolitan water or metropolitan utilities district shall keep all funds, accounts and obligations relating to any one utility under its management separate and independent from the funds and accounts of each other utility under its management. The cost of any consolidated operation shall be allocated to the various utilities upon some reasonable basis determined by its board of directors."

Section 14-1041, R. R. S. 1943, does not provide any particular formula which the district must use for the purpose of allocating the costs. "Reasonable basis," as therein used, means a basis that is appropriate to the purpose for which it is being used, that is, that the customers of one utility do not unreasonably bear the costs which should properly be chargeable to the customers of another. It would appear there are several formulas, under approved accounting methods, by which the board of directors of the district could determine the cost of such consolidated operation upon a reasonable basis, that is, to determine the cost to the district for the use of the facilities and services of its water utility to

collect the sewer use or rental fee lawfully imposed by the city upon the users of its sewer system. However, it should be remembered it is not for the city or the courts to determine what that formula is to be, but it is a matter for the board of directors of the district to decide subject, however, to the courts' right to review such decision to determine if it was made upon some reasonable basis.

It had been costing the city about $101,500 per annum to collect its sewer use or rental fee. The method used by the board of directors of the district, in order to determine what they were going to charge for this service, was to take a figure of $40,500 as the actual or "out-of-pocket" cost of performing the service and then adding thereto half of what it thought that figure would save the city, thus dividing what are referred to as "net savings" to the city from the operation equally between the district and the city. By doing so a figure of $70,500, or 8⅓ cents per customer per month, was arrived at. That is the contract basis upon which the district agreed to perform the service, for the contract provides the "City will reimburse District at the rate of 8⅓ cents per sewer use fee bill rendered." With few exceptions, all billings are to be on a monthly basis. We cannot see where such a basis for determining the cost of the operation is a reasonable one for the amount which the city would save by reason of the district performing these services has nothing to do with the cost thereof to the district. We do not think the district had authority to enter into a contract with the city to perform the services on that basis. We think the trial court was correct when it held the contract between the district and the city was not made in conformity with the provisions of section 14-1041, R. R. S. 1943, applicable thereto and, in view thereof, to be inoperative and without force and effect for it was not made within the scope of the district's authority. In order to be operative a contract entered into under and

pursuant to the authority granted the district and the city by L. B. 295, the requirements of section 14-1041, R. R. S. 1943, that the cost of such operation must be allocated by the board of directors of the district upon some reasonable basis, must be complied with.

The trial court directed that each of the parties to the action should pay its own costs in that court. Under section 25-1933, R. R. S. 1943, this court is authorized to direct each party to pay his own costs or apportion the costs among the parties. Considering the history of the negotiations between the district and city leading up to the contract, including the history leading up to the enactment of L. B. 295, and the purpose for which this suit was brought, we think the same order, with one exception, should be entered by this court. We, therefore, direct that each of the parties to the action shall pay its own costs in this court except that the cost of the bill of exceptions shall be taxed equally between them.

We remand this cause to the district court to render a judgment in accordance with our holdings herein.

AFFIRMED AS MODIFIED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

SERENA WALDBAUM, APPELLEE, V. SIDNEY WALDBAUM, APPELLANT.
107 N. W. 2d 407

Filed February 3, 1961. No. 34803.

1. **Divorce: Appeal and Error.** In an appeal to this court in a divorce action the cause is tried de novo.
2. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

3. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.
4. ———. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony.
5. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
6. ———. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned.
7. **Divorce: Parent and Child.** In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents.
8. ———: ———. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration.
9. **Parent and Child.** A father's legal duty to support his child ceases when the child becomes of age, especially when the record is void of any reason for such support.
10. **Divorce.** The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case.
11. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired,

and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Douglas County: LAWRENCE C. KRELL, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Marks, Clare, Hopkins & Rauth, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action for divorce brought by Serena Waldbaum as plaintiff in the district court for Douglas County, against Sidney Waldbaum, defendant. The defendant filed an answer and cross-petition wherein he prayed for a divorce. The trial court granted the plaintiff an absolute divorce from the defendant, and dismissed the defendant's cross-petition. The defendant filed a motion for new trial. The trial court overruled the defendant's motion for new trial, and the defendant perfected his appeal to this court.

The plaintiff's petition charged the defendant with extreme cruelty. She asked for custody of the minor children, child support, alimony, and division of the property acquired by the parties during the marriage.

The defendant filed a cross-petition in which he charged the plaintiff with extreme cruelty, and asked for the custody of the two younger sons of the parties and a return of certain property taken by the plaintiff from their home when she separated from the defendant.

The plaintiff's reply denied the allegations of the defendant's answer not admitted. The plaintiff, by answer to the defendant's cross-petition, denied the allegations therein contained not admitted, and alleged

other facts relating to extreme cruelty on the part of the defendant. The prayer was for a judgment in accordance with her petition.

In an appeal to this court in a divorce action the cause is tried de novo. Messer v. Messer, 157 Neb. 312, 59 N. W. 2d 395; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368.

When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Stohlmann v. Stohlmann, 168 Neb. 401, 96 N. W. 2d 40; Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731.

We deem the following to be applicable to this appeal.

Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty." See, § 42-302, R. R. S. 1943; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669; Workman v. Workman, *supra*.

Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. See, Messer v. Messer, *supra;* Workman v. Workman, *supra*.

It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. See, Schlueter v. Schlueter, 158 Neb. 233,

62 N. W. 2d 871; Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505; Workman v. Workman, *supra*.

The bill of exceptions in this case is voluminous. It would serve no useful purpose to detail the evidence of the respective witnesses.

For convenience we will refer to the parties as designated in the district court.

The record discloses that the parties were married in New York City, New York, on June 21, 1936. At the time of their marriage the plaintiff was 20 years of age, and the defendant was 22 years of age, and neither party had any substantial assets. At the time of trial the plaintiff was nearly 45 years of age and the defendant nearly 48 years of age. Four children were born as a result of this marriage: David Robert, born March 22, 1937; Caryl Lynne, born August 1, 1940; Howard Miles, born June 19, 1949; and Douglas Ralph, born January 19, 1953. The plaintiff finished high school, studied commercial art at the Pratt Institute, and studied 2 years in the New York School of Fine and Applied Arts. The defendant completed high school, attended college for 3 years, and then spent 6 or 7 months touring Europe. For a few years after the marriage the defendant was employed by S & W Waldbaum, Inc., a New York corporation engaged in the wholesale butter and egg business. The stock in the above corporation was originally owned by the defendant's father and later acquired by his two maternal uncles. After the outbreak of World War II, it was decided that S & W Waldbaum, Inc., should expand its operations and engage in business in the midwest. Thereafter the Twin Rivers Company, Inc., was formed under Nebraska law, with its headquarters at Grand Island, Nebraska, and the New York corporation as the sole stockholder. In the late spring or early summer of 1942, the parties and their family moved to Grand Island where the defendant managed the business of the Twin Rivers Company, Inc. Shortly after the formation of the Twin Rivers Company, Inc.,

the New York corporation sold its entire stock interest in Twin Rivers Company, Inc., one-third each to the defendant and his two maternal uncles, Abe and Jack Inkeles. Subsequently the defendant acquired some stock of the S & W Waldbaum corporation, and the plaintiff acquired some additional stock of such corporation by gift from one of the defendant's uncles, so that the combined interests of the plaintiff and defendant came to represent one-third of the stock issued and outstanding of the New York corporation. By gift from the defendant, the interests of the plaintiff and defendant in the New York corporation were ultimately held in the plaintiff's name. In 1954, following negotiations with his uncles by the defendant, it was arranged for the Twin Rivers Company, Inc., to purchase the outstanding stock of the defendant's uncles in the amount of $116,500, and for the plaintiff to give the defendant's uncles the one-third interest in the New York corporation which then stood in her name and was valued at $30,000, which would show the value of the Twin Rivers Company, Inc., as of that time in the amount of $219,750. The result of this transaction was to make the defendant the sole stockholder in the Twin Rivers Company, Inc., and to sever his connections with the New York corporation.

After moving to Grand Island, the plaintiff and defendant purchased a home at 1508 West First Street in that city. The plaintiff was unfortunate in having miscarriages in January and August 1954, and then began a course of psychiatric treatments, commencing with Dr. E. James Brady of Colorado Springs, Colorado, in the latter part of October 1954. Thereafter the plaintiff was treated by Dr. Frank R. Barta of Omaha, for a period from late October 1954 through the middle part of December 1955. As a part of this treatment the plaintiff was hospitalized from January 24 to February 19, 1955, for psychiatric treatment. In May 1956, the plaintiff began to see Dr. Phillip H. Starr, of Omaha,

a psychiatrist. He treated her until February or March 1959. During this time, the defendant was also treated by both Dr. Barta and Dr. Brady, and also was treated by Dr. Floyd Ring, a psychiatrist in Omaha who shared offices with Dr. Starr.

The course of treatment and the recommendations relating to the mental health of both the plaintiff and defendant are fully explained in the record. The record has been examined and considered in this respect, and the conclusions of the doctors need not be set out.

The testimony of the plaintiff is to the effect that the defendant started a course of conduct which constituted extreme cruelty towards her in either 1947 or 1948. The parties were raised in the Jewish faith, and the plaintiff was taught to believe in and observe the holidays of such faith. The plaintiff desired to raise the children in a belief in the Jewish faith. The defendant refused to observe the holidays of such faith, and apparently had no particular interest in religion. The actions of the defendant in this respect made the plaintiff unhappy and upset her because of his lack of cooperation with her relative to their religion.

It also appears from the record that the defendant refused, at the request of the plaintiff and their son David and others of the children, to attend certain ceremonies conducted by the Boy Scouts and the De Molay, a Masonic organization of which David was a member and at which he was to be honored. The defendant gave a very vague excuse for not attending such ceremonies and disclosed a lack of interest in the welfare of his eldest son at that time.

In 1952 or 1953, there was an argument between the plaintiff and defendant with reference to the defendant purchasing, from catalogs, jewelry, trinkets, household gadgets, and toys for the children which the plaintiff believed to be unnecessary and too extensive. The plaintiff desired to prove to the defendant that such orders of items were unnecessary, and she took from the de-

fendant the receipts and purchase sheets of articles and ran upstairs with them, with the defendant in pursuit of her. She ran into David's room and requested him to hold the receipts. The defendant came in and started to beat David with his fists. The plaintiff tried to pull the defendant off of David and the defendant struck the plaintiff with his hand and fist. At that time the defendant weighed close to 300 pounds, the plaintiff weighed approximately 130-odd pounds, and David weighed 160 pounds. The plaintiff then ran out of the room and called the police while the defendant kept beating David. However, David refused to give the defendant the invoices.

David testified that during the time he was residing with his parents and growing up, he heard arguments between the plaintiff and defendant on numerous occasions, through the night from midnight until 2 or 3 in the morning; and that such arguments were about business, people working in the defendant's plant, and matters relating to family life.

The plaintiff testified that on one occasion in 1956, when the defendant was standing in the kitchen door in the home in Grand Island, he started to quarrel with the plaintiff who was working and who ignored him. She became angered at the defendant and threw a piece of frozen meat at him. The defendant picked up this piece of meat and beat the plaintiff with it on the head, face, and shoulders. The plaintiff testified that she was quite stunned, and that she ran out of the house and went to the police. They suggested that she go to the hospital and call her doctor, which she did. The doctor gave her a sedative and recommended that she remain in the hospital overnight and get a good rest.

The plaintiff testified that on another occasion, after she had filed this action for divorce on July 28, 1958, the defendant switched cars with her while she was attending a function at the Town House in Omaha. She had separated from the defendant and resided in

Omaha at that time. When she came out to get the car it was gone and another car was in its place. She contacted her lawyer with reference to this matter and he informed her to wait until her husband came back to the house and then for her to take the car. At a later date the defendant returned to the plaintiff's home in Omaha and went into the house. The plaintiff endeavored to take possession of the car that the defendant had driven to her home. The defendant came out of the house, pulled the plaintiff out of the car, struck her, and she fell to the ground. This occurred in the presence of the plaintiff's children and her attorney.

The plaintiff further testified that during the past several years the defendant had made threats to commit suicide, and that this usually occurred when the defendant failed to have his own way. On at least two occasions the defendant left suicide notes in his own handwriting, one to the plaintiff and one to his mother. The one to his mother was not mailed, and was dated March 21, 1956. On this occasion the defendant talked about suicide, telling the plaintiff that he was going to take his own life for the reason that he was discouraged and had nothing to live for. The plaintiff endeavored to prevail upon him not to act in such a manner. On another occasion in the summer of 1956 or 1957, the defendant came home from his office at noon, put the car in the garage, which he usually did not do, and closed the garage door. He told the plaintiff he was unhappy, he didn't want to live, that he was a burden and no good to her or the children, and that he was going to take his own life. The plaintiff tried to persuade him not to do so. There was then some argument with reference to money which upset the plaintiff. The defendant went to the garage, but later left the garage unknown to the plaintiff. The plaintiff called the police, and they inspected the garage and later found the defendant sitting in the livingroom of his home in Grand Island. The defendant told the

police that his wife had made him miserable, and the police reprimanded the defendant. This apparently was done for the purpose of upsetting the plaintiff.

The record shows that in the early 1950's the defendant became obsessed with sex to an abnormal extent and insisted that the plaintiff indulge in unnatural forms of marital relations. Dr. Starr, a psychiatrist who treated both parties, described in detail the effect of this type of conduct on the part of the defendant toward the plaintiff which need not be repeated in this opinion, and testified that the defendant's conduct in this regard caused the plaintiff to become emotionally upset. Dr. Starr's testimony corroborated the plaintiff's testimony that the sexual appetites of the defendant revolted and disturbed her, and was the basic reason for her seeking psychiatric help. The doctor further testified that the defendant was in need of psychiatric help, and both the plaintiff and defendant did receive such help for some time. The record also shows that the defendant purchased books on sex relations of the erotic type, and also had a collection of nude photographs.

The record further shows that the defendant's conduct was that of a selfish, inconsiderate, self-indulgent, and egotistical individual. He testified concerning a passage in one of the sex books he purchased to the effect that there are many types of neurotic husbands; that there is the type who is egotistical, self-centered, and demanding; and that the wife of such a husband is expected to conform to his plans. The defendant felt that the words "egotistical, self-centered, and demanding" applied to him.

The record details many other acts such as arguments and controversies relating to the habits of each of the parties, and their conduct and actions toward each other which thoroughly indicate that these parties are unable to live in peace and harmony with each other and, as stated by their psychiatrists, should be separated at least temporarily.

From the record it is manifest that the acts of the defendant toward the plaintiff were sufficient to constitute extreme cruelty within the purview of the authorities heretofore cited, and we conclude that the trial court did not err in granting the plaintiff an absolute divorce.

The record shows that the defendant filed an action for divorce against the plaintiff on September 9, 1957. This was evidently for the purpose of inducing the plaintiff to return to him. She had previously separated from him, had lived in Omaha, and had taken an extended vacation in the east. The plaintiff did return to the defendant, and the defendant dismissed his action for divorce. This reunion lasted but a short time. Thereafter the present action was commenced by the plaintiff. The defendant contends that the plaintiff condoned his conduct of which she now complains as constituting extreme cruelty.

Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. See, Kidder v. Kidder, 159 Neb. 666, 68 N. W. 2d 279; Workman v. Workman, *supra*.

The defendant's contention with reference to condonation on the part of the plaintiff under the facts is without merit for the reason that there was a repetition of the offenses constituting extreme cruelty toward the plaintiff which would revive any wrong allegedly condoned.

The trial court by its decree granted the plaintiff the control and custody of Douglas, the youngest child of the parties, and granted the defendant the control and custody of Howard who was 10 years of age at the time of this trial.

The record shows that both the plaintiff and defendant have great affection for their children and are de-

sirous of making adequate provision for their care and support.

The statutory rule is: "Upon pronouncing a sentence or decree of nullity of a marriage and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain. * * *." § 42-311, R. R. S. 1943. See, also, Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217.

In Stohlmann v. Stohlmann, *supra,* this court said: "In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration." State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677, is cited.

Howard told the trial judge that he preferred to live with his father in Grand Island because he has an asthmatic condition which is an emotional problem, and when he is in Grand Island with his father he does not have such a condition; that there is a lady who stays at the home in Grand Island and cooks the meals and has care and supervision of him, and in addition there is a lady who comes at times during the week to clean the house and do the laundry; that he attends a school which is close to his home; that he does good work in school; that his father is generally home with him in the evenings and at other times; that he has no objection to visiting his mother from time to time under proper circumstances; and that he has friends and his interests in Grand Island and prefers to reside there with his father which would be the best thing to do under the present circumstances.

We conclude that Howard has shown a high degree of intelligence and manifested his desires in such a man-

ner as to warrant being placed in the custody, care, and control of his father, and the trial court did not err in placing the custody of Howard in the defendant, the trial court finding both parents to be suitable persons to have the care, control, and custody of the children.

It also appears from the record that at the time of the trial the plaintiff was employed at a mercantile store. Caryl, when she was not otherwise engaged, would be at home with Douglas. Also, the plaintiff has made provisions for the care of Douglas while she is employed.

Insofar as David is concerned, he is a graduate of Massachusetts Institute of Technology and was 22 years of age at the time of trial.

The decree of the trial court shows that beginning November 1, 1959, and continuing for 3 years, or until further order of the court, the defendant should pay $200 each month for the support of Caryl while she is residing with the plaintiff and attending college or university.

The trial court's decree required the defendant to cash United States Government E bonds of the face value of $4,100, and place the proceeds in an irrevocable trust whose corpus and income may be used only for the college education of Howard and Douglas, and must be distributed to them when they reach the age of 23 years.

Section 38-101, R. R. S. 1943, provides: "All persons under twenty-one years of age are declared to be minors; but in case a female marries under the age of twenty-one years her minority ends."

The general rules of the law of parent and child, being based on the child's incapacity, both natural and legal, and its consequent need of protection and care, apply only while the child is under the age of majority, and the father's legal duty to support his child ceases when the child comes of age. See, Annotation, 42 A. L. R. 150; 39 Am. Jur., Parent and Child, §§ 68, 69, pp.

708, 710; Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541, 42 A. L. R. 146.

There are no circumstances shown in the instant case that would require the defendant to support his children upon their obtaining adulthood. Caryl will be 21 years of age on August 1, 1961. Consequently, any allowance for child support for her shown in the decree beyond that period of time should not be allowed, and we so hold.

Insofar as the irrevocable trust created by the trial court in favor of Howard and Douglas is concerned, this part of the decree should be vacated and set aside for the same reason as shown by the above authorities. It can be adduced from the record that the parties would not fail to provide adequate education for their children.

Insofar as the decree relating to the right of visitation of the parents to the children is concerned, we believe this is proper and that it should not be disturbed. The decree provides that the defendant is to have the right to have Douglas visit him one weekend, Friday evening through Sunday afternoon, each month, and the plaintiff is entitled to have Howard visit her under the same type of arrangement. It is also ordered that the boys should spend not less than 30 days of each summer vacation together, all of which is subject to further order of the court.

The trial court provided that the defendant should pay the sum of $125 each month for the support of Douglas, and that this amount be increased to $150 each month upon the termination of payments of support for Caryl. We believe that the sum of $125 a month would be sufficient for the support and maintenance of Douglas until there is an adequate and proper showing made, as provided for by law, that such amount should be increased.

By the decree the trial court required the defendant to maintain, keep in force, and pay the premiums on adequate hospitalization and medical insurance for the minor children, and to pay all extraordinary medical

and hospital expense incurred by or on behalf of the minor children, with the exception of fees of psychiatrists or plastic surgeons which would be allowed only upon order of the court. We believe that this part of the court's decree should be held for naught.

Section 42-312, R. R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. See, Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315; Workman v. Workman, *supra.*

"In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348.

This marriage lasted for a period of 23 years. There is no question but that the defendant supported the plaintiff and his children in a comfortable, generous,

and even lavish style. The family acquired a good social status and had many of the finer things of life.

The trial court's decree provided for a division of the property by awarding to the plaintiff the home purchased by her at 9424 Capitol Avenue, in Omaha, subject to taxes, liens, and encumbrances thereon, including a mortgage to an insurance company. The court found the equity in such home to be in the amount of $7,500. This home was purchased with the consent of the defendant. The court further awarded the plaintiff the household goods and furnishings contained in such home, except certain items which apparently were claimed by the defendant. The plaintiff was also awarded a 1959 Chevrolet Impala sedan valued at $2,000; the balance in a checking account carried in the name of the plaintiff in the amount of $2,500; and certain clothing and other articles belonging to the plaintiff, Caryl, and Douglas. The defendant was given credit for the sum of $8,000, representing the differential in bonds, home furnishings, cash in Caryl's possession or bank account, and unwarranted expense on the part of the plaintiff.

The court allowed permanent alimony to the plaintiff in the amount of $55,000, $5,000 payable within 10 days from the date of the decree and the balance of $50,000 to be paid at the rate of $400 each month commencing 1 month from the date of the decree and a like amount to be paid on the first day of each and every month thereafter until the sum of $55,000 is paid in full. The decree ordered that said payments of alimony totaling $55,000 should be deductible for income tax purposes by the defendant in accordance with pertinent regulations and provisions of the Internal Revenue Code.

The trial court awarded the defendant, as his sole and separate property, the home in Grand Island; the furniture, fixtures, and household goods contained therein; a stamp and coin collection, except that David's stamp collection should be delivered to him; 6 shares of stock

of the First National City Bank of New York City; 72 shares of stock in Manufacturer's Trust Company of New York City; all shares of stock, and all right, title, and interest in and to Twin Rivers Company, Inc., a Nebraska corporation; the total of $22,000 face value of United States Government bonds; all clothing and personal effects of the defendant and Howard located at either home or in storage at Grand Island; all articles and personal property in storage at Grand Island with the exception of those that belonged to Caryl and Douglas; the balance in the personal checking account of the defendant; and a 1953 Packard automobile now titled in the name of the plaintiff, and the court ordered the plaintiff to execute the title certificate to the defendant. The defendant was ordered to pay all family bills owing as of September 1, 1959, in the total amount of $2,360.96. The decree further ordered that the defendant should in the future have the right to take as exemptions under his personal income tax return Caryl, Douglas, and Howard, as long as he continues to pay the child support as provided under the decree; and that the defendant pay the costs of the action, including attorneys' fees in the amount of $5,000, to be payable forthwith to the clerk of the district court. The trial court divided the $5,000 fee as $2,500 payable for services rendered in obtaining the divorce, and $2,500 for services rendered in connection with the property litigation. The decree was rendered accordingly.

While the trial court states in the decree that the plaintiff shall be awarded as permanent alimony and division of property the total sum of $75,000, being items of real and personal property, cash, and stock, and then made a provision awarding the plaintiff $55,000 as permanent alimony as heretofore mentioned, it should be stated that the items constituting the equity in the home in Omaha, the Chevrolet Impala sedan, the checking account, and the $55,000 alimony payable as provided for by the decree, constitute a total of $67,000.

The difference between the $75,000 and $67,000, or $8,000, was the credit given to the defendant on differential in bonds, home furnishings, cash in Caryl's possession or bank account, and unwarranted expense on the part of the plaintiff.

We have heretofore set out that part of the trial court's decree relating to child support and the creation of an irrevocable trust, and have determined the same.

The record discloses a sharp conflict in the evidence as it relates to the value of the personal and real property owned by the plaintiff and defendant. This is especially true with reference to the value of the stock of the Twin Rivers Company, Inc., owned exclusively by the defendant, and the value of the business conducted by such corporation which is an egg processing business. True, it is a business that fluctuates, in other words, in some years it returns a substantial profit while in others it sustains a loss. However, generally speaking the returns from such business have shown it to be a substantial business, and its present and future status is not as discouraging as the defendant testified. Neither the plaintiff or defendant, for the most part, gave a fair, complete, or accurate valuation of the property owned by each which is involved in this case. There is no question but that the trial court gave careful consideration to the record upon this phase of the case, as did this court. We conclude, from a review of the evidence on this phase of the case, that it fully sustains the trial court's judgment with reference to a division of the property between the parties here involved, and the allowance for permanent alimony.

We conclude that the decree of the trial court should be modified with reference to child support, as heretofore set forth; that the irrevocable trust created by the trial court for the benefit of Howard and Douglas should be held for naught; that the defendant should be required to pay the plaintiff $5,000 in cash as an alimony payment within 30 days after the issuance of the man-

date in this case and attorneys' fees as allowed by the trial court in the amount of $5,000 within the same period of time; and that the part of the trial court's decree requiring the defendant to maintain, keep in force, and pay the premiums on adequate hospitalization and medical insurance for the minor children and to pay all extraordinary medical and hospital expenses incurred by or on behalf of the minor children with the exception of fees of psychiatrists or plastic surgeons which would be allowed only on order of the court, should be held for naught for the reason hereinbefore stated. We award as costs to the plaintiff attorneys' fees in the amount of $2,500 for services rendered by plaintiff's attorneys in this court. In all other respects we find the decree and judgment of the trial court to be correct.

For the reasons given herein we affirm in part and in part reverse the judgment and remand the cause to the district court with directions to enter judgment in conformity with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

MORGAN D. WELTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
107 N. W. 2d 394

Filed February 3, 1961. No. 34810.

1. **Criminal Law: Evidence.** It is permissible for a party to ask his own witness whether he made prior statements inconsistent with his testimony and such an inquiry is not objectionable, although the incidental effect of it is to impeach the witness. Such an examination is a proper one for the purpose of showing that the testimony of the witness operated as a surprise, or to test his recollection, refresh his memory, induce him to change his testimony, draw out an explanation of his apparent inconsistency, or show the circumstances which induced the party to

call him, and that such party had been placed at a disadvantage by unexpected evidence.

2. **Criminal Law: Trial.** Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.

ERROR to the district court for Garfield County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Tedd C. Huston, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

The plaintiff in error, who will be referred to herein as the defendant, was charged with contributing to the delinquency of Marjorie Davenport, a child under 18 years of age, in violation of section 28-477, R. R. S. 1943. The complaint was originally filed in the county court of Garfield County, Nebraska. Upon a plea of guilty, the defendant was sentenced to imprisonment in the county jail and to pay a fine and costs.

The defendant appealed to the district court for Garfield County, Nebraska, he pleaded not guilty, and upon trial to a jury was found guilty. His motion for new trial was overruled and he was sentenced to imprisonment in the county jail for 45 days and fined $200 and costs. The defendant then filed his petition in error in this court.

The girl named in the complaint will be referred to herein as the complaining witness.

Of the errors assigned, only those which have been discussed will be considered. Revised Rules of the Supreme Court, rule 8a2(4); Linder v. State, 156 Neb. 504, 56 N. W. 2d 734.

The defendant has not challenged the sufficiency of

the evidence to support his conviction. Therefore, it will not be necessary to include a detailed review of the evidence in this opinion.

The defendant complains that he was prejudiced because the county attorney questioned the complaining witness in reference to a conversation she had with a state safety patrolman after the offense had been committed, and that the trial court erred in permitting the county attorney to read from a statement made to the patrolman by the complaining witness.

No statement was introduced in evidence and none appears in the record. The record shows that the following occurred on direct examination of the complaining witness by the county attorney: "Q. Did Mr. Welton get on top of you at all while in the back seat of the car? A. I don't remember. Q. Do you know what the genital organs are, Miss Davenport? A. Yes. Q. Did Mr. Welton place his hands or otherwise touch any of your genital organs? A. I don't know. Q. Refreshing your memory, do you recall talking to a trooper, Donald Grieb, about this matter shortly after it happened? A. Yes. Q. Is it true you gave him a statement to the effect while you were in the car at this time Mr. Welton—

"MR. HUSTON: Your Honor, I will have to object to the questioning from this document. The witness has already testified that she didn't remember.

"THE COURT: I think he has a right to refresh her memory from previous statements.

"Q. Miss Davenport, do you recall talking to Trooper Grieb about this matter? A. Yes. Q. Is it true at that time you told him Mr. Welton did touch your genital organs? A. I guess so.

"MR. HUSTON: I further object on the basis it's impeaching his own witness.

"THE COURT: Overruled."

The defendant relies upon Masourides v. State, 86 Neb. 105, 125 N. W. 132, and Erdman v. State, 90 Neb. 642, 134 N. W. 258, Ann. Cas. 1913B 577.

In Penhansky v. Drake Realty Constr. Co., 109 Neb. 120, 190 N. W. 265, the court set aside the rule as to contradiction of witnesses stated in Masourides v. State, *supra*. In Penhansky v. Drake Realty Constr. Co., *supra*, the plaintiff called the driver of the defendant's truck as her own witness. The truck driver testified in contradiction to statements which he had made to the plaintiff's counsel before the trial. The court held that the plaintiff was entitled to show the prior contradictory statements of the witness and set aside the rule as to contradiction of witnesses stated in Masourides v. State, *supra*.

The following rule is applicable here: It is always permissible for a party to ask his own witness whether he had made prior statements inconsistent with his testimony and such an inquiry is not objectionable, although the incidental effect of it is to impeach the witness. Such an examination is a proper one for the purpose of showing that the testimony of the witness operated as a surprise, or to test his recollection, refresh his memory, induce him to change his testimony, draw out an explanation of his apparent inconsistency, or show the circumstances which induced the party to call him, and that such party had been placed at a disadvantage by unexpected evidence. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649; Moore v. State, 147 Neb. 390, 23 N. W. 2d 552.

In this case the county attorney did not attempt to introduce a written statement as such or read at length to the witness from such a statement. Under the circumstances in this case it was proper for the county attorney to examine the complaining witness concerning her previous conversation with the patrolman for the purpose of refreshing her memory.

The defendant also complains that the trial court erred in failing to instruct the jury as to the defendant's theory of the case, as to the weight to be given to the testimony of a witness who has been impeached, and

that evidence which is admitted for the purpose of impeachment is not substantive evidence. The defendant has cited no authority in support of his contentions in this regard.

The defendant's plea was not guilty. His testimony amounted to a denial that the offense occurred. He presented no evidence of an affirmative or other special defense. The assignment of error in reference to a failure of the trial court to instruct the jury as to the defendant's theory of the case is without merit.

There is no testimony or other evidence in the record which was admitted for the purpose of impeachment. It is true that the county attorney was permitted to examine the complaining witness in reference to a previous conversation which she had with the patrolman. That evidence was admitted for the purpose of refreshing the recollection of the witness and any effect which it may have had of tending to impeach the witness was incidental. Thus, there was no occasion for the trial court to instruct the jury as to the weight to be given to the testimony of a witness who has been impeached or that evidence admitted for the purpose of impeachment is not substantive evidence.

The trial court instructed the jury generally as to the issues in the case. The defendant has not challenged any of the instructions which were given and did not request any instructions in addition to those which were given. In this situation the following rule is applicable: "Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, when no proper instruction has been requested by the party complaining." Smith v. State, 169 Neb. 199, 99 N. W. 2d 8. See, also, Frades v. State, 131 Neb. 811, 270 N. W. 314.

The judgment is affirmed.

AFFIRMED.

JOSEPH A. GRASSO, APPELLEE, V. ADOLPH DEAN ET AL., APPELLANTS, IMPLEADED WITH STATE FINANCE COMPANY, A CORPORATION, ET AL., APPELLEES.
107 N. W. 2d 421

Filed February 3, 1961. No. 34848.

1. **Contracts: Duress.** A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired condition of the mind, may amount to duress.
2. ———: ———. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails.
3. **Parent and Child: Duress.** Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided.
4. **Bills and Notes: Mortgages.** If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Philip M. Kneifl and *Abrahams, Kaslow & Cassman*, for appellants.

Joseph T. Votava, for appellee Grasso.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This is an action by appellee Grasso, hereinafter referred to as plaintiff, against appellants Adolph, Gladys, and Joan Dean, hereinafter referred to as defendants, and defendant corporations, State Finance Company, Postal Finance Company, and First Loan Company. It seeks to foreclose a mortgage on the home owned by defendants Adolph and Gladys Dean, in which the three

defendant corporations are alleged to claim some interest. The mortgage was given to secure an installment promissory note signed by the three defendants Dean.

The defense raised by defendants Adolph and Gladys Dean, hereinafter referred to as Adolph and Gladys, is that the promissory note and mortgage were without consideration and were obtained by the use of duress and threats. Defendant Joan Dean, hereinafter referred to as Joan, pleaded duress and the disaffirmance of the contract because of infancy.

The trial court in its judgment found that defendant corporations, State Finance Company and First Loan Company, had failed to plead or answer; and entered their default. It found defendant corporation, Postal Finance Company, to have a first lien on the property involved herein. It found plaintiff to have a second lien in the amount of $7,432.56 as of February 18, 1960. The trial court then entered a judgment of foreclosure and ordered that if the proceeds of the sale were insufficient plaintiff on motion would be entitled to a deficiency judgment against defendant Joan.

The essential facts are: Defendant Joan entered the employ of plaintiff, a dentist, in 1954 as an office clerk, receptionist, and technician. Plaintiff had been in practice but a few months. Joan was 16 years of age but represented herself to be 18. During the years 1956 and 1957, Joan embezzled funds belonging to plaintiff. According to plaintiff's testimony, Joan admitted "about the fourth or sixth month * * * of 1957," that she had been taking money, but could not give the amount. Audits were made by plaintiff's accountant. On October 24, 1957, Joan, in the office of plaintiff's accountant and in his presence, and in the presence of plaintiff, signed an "affidavit of admission," but no amount was stated. During December 1957, Joan made two payments on the obligation. Subsequent to these payments, plaintiff insisted that Joan bring her father to his office. About 2 weeks previous to February 18, 1958, Joan brought

Adolph to plaintiff's office. Previous to this time, Joan had not wanted her folks informed. At this visit, plaintiff discussed Joan's difficulty with her father, who, according to plaintiff's testimony, said, "he would help her in any way he could, and he was appreciating what I was doing." On February 18, 1958, Joan and Adolph met plaintiff at the home of plaintiff's accountant, and signed a note for $7,974, and Adolph executed a mortgage on the Dean home. The Deans had never furnished plaintiff with a description of the property nor had there ever been a specific reference to a mortgage on their home. The papers were prepared by plaintiff's attorney, who never appeared in the transaction. The note and mortgage were signed. Then Adolph, Joan, plaintiff, and the notary public went to the Dean home where the instruments were signed by Gladys who had not previously been informed about Joan's difficulty.

The evidence on the amount of the defalcation is in dispute. Joan contends it could not have exceeded $1,500. The testimony of plaintiff's witness sets the amount at $8,200.38. The note was for $7,974. Payments have been made in the amount of $1,283.45. All of these payments were made by Joan. The testimony of the parties as to the alleged facts constituting duress is in conflict, and no purpose will be served by detailing the respective contentions of the parties. Suffice it to say that the testimony, in the light of the circumstances apparent from the record, leaves little doubt as to the way the issue should be resolved.

The evidence in this case is undisputed that Joan did embezzle funds of plaintiff. However, in considering the defense of duress herein, the question of her guilt or innocence is immaterial. The question is whether the facts and circumstances, as disclosed by the record involved, constitute duress. In Nebraska the law is well established that where a parent or other relative is induced to execute an instrument by threats and fear of criminal punishment of a child or relative, the instru-

ment is the result of duress and the contract may be voided. Beindorff v. Kaufman, 41 Neb. 824, 60 N. W. 101; Hoellworth v. McCarthy, 93 Neb. 246, 140 N. W. 141, 43 L. R. A. N. S. 1005.

We said in Farmers State Bank v. Dowler, 112 Neb. 262, 199 N. W. 528: "Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails."

Plaintiff testifed: "* * * we have never told them that we were going to prosecute, all we told them was *that we weren't interested in having any trouble, we weren't interested in hurting them or harming them in any way,* but we just wanted to help them. * * * I had never mentioned any threat of any kind, but I had told him that *I knew that it was a bad situation and that I would like to help them as much as possible.* * * * Q. But let's try and get one point clear. Up to the time he walked into this room and saw a note and a mortgage that was on the table, you had never had any real discussion with him about the fact that you were asking him to be bound by a promissory note to pay you back in full on the amount you claimed and also to put up his house as security? A. As I recall, I had told him that I had discussed this with my attorney on a meeting previous to the time we met in Mr. Watts' office, that I had told him that we should do it in a legal manner and he knew that that was the reason he was to come there, to sign these legal notes and documents. * * * Q. All right, let's go back. The first meeting with Mr. Dean at your office did you tell him that you expected him to sign a promissory note in the sum of approximately $8,000 and to execute a mortgage on his home directly to you to pay for Joan's defalcations? MR. GARROTTO: I object to that as already answered. THE COURT: He has already answered that; he said no." (Italics supplied.)

The testimony of Wesley Fox, the notary public who took the acknowledgment and who was called by plaintiff, is as follows: "I believe that some mention was made concerning the papers, and now, whether the word 'mortgage' was mentioned, I do not recall, but as I recall the conversation, he indicated that if the Deans would sign this mortgage, that no charges would be pressed, and that the doctor did not want to press any charges, he merely wanted to work it out with them. But I don't believe Mr. Watts used the word 'prison' at all, I believe the actual words were something about preferring charges or something of that nature." It is true that the witness was referring to his conversation with plaintiff's accountant Watts and not to any conversation with plaintiff. It is inserted here because of the light it tends to shed on statements made by plaintiff's accountant who was an active participant in securing the instruments.

Plaintiff's accountant Watts testified: "Q. Now then, was anything else said there with reference to the amount due at that time? A. I said that it being a large amount, and there wasn't an exact amount specified other than it was large, that we'd all have to work it out together. Mr. Dean thanked us very much for cooperating the way that we had, and I said to Mr. Dean, 'There is no reason why this thing can't be worked out.' * * * Q. Now, Mr. Dean was already there when you arrived? A. That's correct. Q. Did you observe the way he appeared when you arrived? Was he broken up at that time? A. At first he was, yes. Q. He had been crying? A. Well, there was tears in his eyes. I would assume. Q. And then you joined in the conversation? A. Correct. Q. And do you remember what your words were as you began the conversation, or what you said? A. Well, to the effect that the money that Joan had taken, *we didn't want a lot of publicity about it, we wanted to try and help them work things out,* that all we were interested in is Doctor getting his money

back. Q. Did you say something about the fact that she was in a serious position? A. That's correct. * * * Q. Just tell us what you said, just what you said in regard to paper. A. *That we wanted to try to rehabilitate her, we didn't want to persecute her, we wanted to do everything to help her. In other words, just because she is down we didn't want to trample her, we wanted to help her.*" (Italics supplied.)

The word "persecute" as used by the witness would ordinarily have an entirely different meaning, but as used here could logically be calculated to induce fear of prosecution. Joan had confessed to taking money several months before. She had given a written admission on October 24, 1957. She had also made payments on the obligation. What was to be "worked out"? What was plaintiff doing that Joan's father appreciated? Why wasn't it necessary for plaintiff to discuss the amount with the father? Why was plaintiff so certain the Deans would give a mortgage on their home that he had one prepared without even discussing it with them before the night it was executed? When we consider the substance of the testimony adduced by plaintiff, we can readily conclude the obvious answer must be the correct one. There was a threat of prosecution under plaintiff's evidence, and while not stated in so many words, it evidently produced the desired condition of mind.

The testimony of defendants is to the effect that they signed because otherwise Joan "would just have to go over the road."

In this case, which we try de novo, we resolve the fact question in the affirmative and hold that a disguised threat may fairly be inferred from the testimony adduced on behalf of plaintiff, and that such threat was as effective for the purpose of inciting fear as a direct statement. Hoellworth v. McCarthy, *supra*. We believe the consideration for the giving of the note and mortgage was the suppression of a criminal prosecution, and find

the transaction illegal and void and that no recovery can be had thereon. Smith Premier Typewriter Co. v. Mayhew, 65 Neb. 65, 90 N. W. 939.

There is a wide variance between Joan and plaintiff as to the amount of the defalcation. While it is generally true that an embezzler little realizes how fast his abstractions move into large figures, it does test credulity to believe that a dentist in practice only 3 years and operating alone would not notice the withdrawal from January 1, 1956, to "the fourth or sixth month * * * of 1957," of over $8,000. This is an average in excess of $400 per month. The evidence is that plaintiff personally made all of the bank deposits. He could not help but have some awareness of his volume of business. A minor should be held liable for defalcations. If, however, there has been a misrepresentation of the amount involved, or if the minor has been overreached, certainly relief should be granted, and she should have her day in court.

We find the note and mortgage void, and as to defendants Adolph and Gladys Dean we reverse the judgment of the trial court and dismiss the action. As to defendant Joan Dean we reverse the judgment of the trial court and remand the cause for further proceedings, with costs in this action taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

RUTH ERICKSON ET AL., EXECUTORS OF THE ESTATE OF A. HORACE ERICKSON, DECEASED, APPELLEES, V. METROPOLITAN UTILITIES DISTRICT, A CORPORATION, ET AL., APPELLANTS, HAROLD M. DIERS ET AL., INTERVENERS-APPELLEES.

107 N. W. 2d 324

Filed February 3, 1961. No. 34862.

1. **Municipal Corporations.** A metropolitan water district organized pursuant to section 14-1002, R. R. S. 1943, is a body corporate and possesses all of the usual powers of a corporation for public purposes.

2. ———. A metropolitan water district is empowered to exercise any and all powers that are possessed by or which may be granted to cities and villages by the general statutes of this state for the construction and extension of waterworks.
3. ———. A metropolitan water district in the conduct of its affairs functions in the nature of a private enterprise for the convenience, advantage, and benefit of the area of functioning, the inhabitants thereof, and the property owners therein.
4. ———. The board of directors of a metropolitan water district has power and authority to determine and fix all water rates; to determine what shall be a reasonable rate for any particular service; to prescribe the conditions and methods of water service; to collect all charges for water service or the sale of water; and to make rules and regulations as it deems proper for the operation of its water plant.
5. ———. Where a water district furnishes water to the public at large it may classify users and charge different rates to the different classes provided that the charges are reasonable and not discriminatory.
6. ———. Those engaged in serving water to the public generally may not make unreasonable and unjust discrimination either in service or rates among their patrons.
7. ———. A metropolitan water district having power to adopt rules and regulations is required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing de novo in the courts.
8. **Municipal Corporations: Courts.** The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination.
9. **Municipal Corporations: Injunction.** The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Affirmed.*

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellants.

J. A. C. Kennedy, Yale C. Holland, George L. DeLacy, Ralph E. Svoboda, and *Clarence E. Heaney, Jr.,* for appellees.

Eugene D. O'Sullivan, for intervener-appellee O'Sullivan.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This action was originally instituted in the district court for Douglas County, Nebraska, by A. Horace Erickson, plaintiff, against the Metropolitan Utilities District, a public utility corporation created pursuant to statutes of the State of Nebraska, which will be referred to as the district, the individual members of the board of directors of the district, and the general manager thereof, defendants. It is not deemed necessary to name herein the members of the board of directors or the general manager. The plaintiff died during the pendency of the action and in consequence Ruth Erickson and the Omaha National Bank, as executors, were substituted as parties plaintiff. Before the case was tried three separate groups of parties, one corporation, and one individual filed pleadings and became interveners in the case. Their relation to the subject matter of the action was in substance the same as that of the plaintiff.

The action, briefly stated, was by plaintiff to enjoin the district and its officers and directors from imposing and collecting a water surcharge; from imposing penalties and taking punitive action for refusal to pay a water surcharge; and from exacting a rate for seasonal use of water not applicable to all seasonal users on the basis of the amount of water used. The relief sought by the interveners was in substance the same as that sought by the plaintiff.

The action was tried to the court and a judgment was rendered in favor of plaintiffs and interveners and against the defendants. Motion for new trial was filed. From the final judgment and the order overruling the motion for new trial the defendants have appealed.

For the further purposes of this opinion the plaintiffs and the interveners will be referred to as appellees, unless other reference is required, and the defendants will be referred to as appellants, except when separate reference is made to the Metropolitan Utilities District. At such times it will, as has already been indicated, be referred to as the district.

By the pleadings of the appellees it is substantially alleged that the district is a public utility corporation organized and carrying on its business under and by virtue of the laws of the State of Nebraska, and as such it operates the water system which serves the inhabitants of the city of Omaha and surrounding territory within the limits of the district; that the district adopted a rate schedule or surcharge for all nonconserved air-conditioning equipment; that the schedule was denominated " 'Rate Schedule W-S. Surcharge Rates for Non-conserved air-conditioning' "; that the surcharge rate exaction was $36 per ton of capacity of nonconserved water-cooled air-conditioning units; and that this surcharge is for reasons enumerated arbitrary, unreasonable, unjust, oppressive, and discriminatory. Of the enumerated reasons those necessary to a determination of this case will be adverted to later herein. The date this surcharge was adopted is not declared in the pleadings but the record discloses it was January 4, 1956, effective as of January 1, 1956. It exempted all units installed up to and including April 30, 1956, for the years 1956 and 1957.

By answers containing detailed contentions in that area the appellants deny the charge that the surcharge is arbitrary, unreasonable, unjust, oppressive, and discriminatory.

The ultimate determination in this action properly depends upon which of these two opposing contentions must be sustained under the facts and applicable legal principles. Subordinate and preliminary to an ultimate determination the proper approach, in the light of

the peculiar capacity and powers of the district, must be ascertained.

The general powers of the district are found in section 14-1002, R. R. S. 1943. To the extent necessary to state them here, they are the following: "A metropolitan water district shall be a body corporate and possess all the usual powers of a corporation for public purposes, * * *. It may exercise any and all the powers that are now or may be granted to cities and villages by the general statutes of this state for the construction or extension of waterworks."

Specific regulatory powers which are of concern in this case are found in section 14-1015, R. R. S. 1943, as follows: "The board of directors of the metropolitan water district shall have power and authority to determine and fix all water rates, and to determine what shall be a reasonable water rate for any particular service, the conditions and methods of water service, the collection of all charges for water service or the sale of water; * * *. The board of directors shall also have authority to make such rules and regulations for the conduct of the water plant controlled and operated by the metropolitan water district, and the use and measurement of water supplied therefrom as it may deem proper, including the authority to cut off any water service for nonpayment, or for nonmaintenance of the pipes and plumbing connected with the supply main, or noncompliance on the part of any water user with the rules and regulations adopted by the board for the conduct of its business and affairs."

While it is a matter of no real importance in the determination of the issues involved here the present name of the district flows from section 14-1101, R. R. S. 1943, and not from the original legislation empowering the creation of metropolitan water districts.

The capacity in which the district as such performs its functions does not appear to have been clearly defined in the statutes, the decisions of this court, or in the briefs

of the parties to this action, although the inference to be drawn from all of these is that there is an accord that it does not perform a governmental function but one in the nature of a private enterprise for the convenience, advantage, and benefit of the area of functioning, the inhabitants thereof, and the property owners therein. This conclusion flows from the pronouncement contained in Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N. W. 858. This is the logic which flows from the language in the opinion in that case which declares that when a city is performing like functions the exercise thereof is not governmental but in the nature of a private enterprise. This is supported by the language of United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576, wherein the functions of other public corporations are described and analyzed.

In the performance of the functions under the power granted by the statute the district in the matter of service rendered and rates to be charged therefor, the question of whether or not the district has acted unreasonably and arbitrarily has been recognized as a matter proper for judicial examination and review. The case of Keystone Investment Co. v. Metropolitan Utilities Dist., 113 Neb. 132, 202 N. W. 416, 37 A. L. R. 1507, is one wherein there was such a review. No case has been cited or found to the opposite effect.

The parties however, while apparently agreeing that there may be a review, do not agree as to the character and extent of that right. The position taken by the district is lacking in clarity. The interpretation placed upon that position appears to be about as follows: If on the hearing in the district court there was competent and relevant evidence to sustain the action of the district and on which evidence it could not be said the action was arbitrary and unreasonable, and if such action was within the scope of the powers of the district, the court could not of right declare it invalid.

It relies for this position on Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331, and cases cited from other jurisdictions. Neither this case nor any of the others is authority for this position. The cited case is one which came to this court for review of action taken after full hearing and determination of the Nebraska State Railway Commission which is a constitutional department of state government clothed with power, among others, to hold hearings and establish rates for common carriers in intrastate commerce. Art. IV, § 20, Constitution of Nebraska. The powers of hearing and decision conferred upon the Nebraska State Railway Commission are not conferred on the district either by Constitution or statute. That case therefore does not amount to authority for the contention made. Furthermore this position is inimical to the status of the district as indicated by what was said in Metropolitan Utilities Dist. v. City of Omaha, *supra,* and Keystone Investment Co. v. Metropolitan Utilities Dist., *supra.*

In practice, if not by specific declaration, it has been the rule that public service corporations having power to adopt rules and regulations are required to exact reasonable requirements, the reasonableness of which may be inquired into in a full hearing in the courts. See, Western Union Telegraph Co. v. Call Publishing Co., 44 Neb. 326, 62 N. W. 506, 48 Am. S. R. 729, 27 L. R. A. 622, 58 Neb. 192, 78 N. W. 519, affirmed 181 U. S. 92, 21 S. Ct. 561, 45 L. Ed. 765; American Water-Works Co. v. State ex rel. Walker, 46 Neb. 194, 64 N. W. 711, 50 Am. S. R. 610, 30 L. R. A. 447; Albert v. Davis, 49 Neb. 579, 68 N. W. 945; Hoover v. Deffenbaugh, 83 Neb. 476, 119 N. W. 1130. This represents substantially the theory on which the appellees have proceeded.

The conclusion reached is that the question of the validity of the exactions made by the district which are here for review was the proper subject of a full hearing de novo by the district court. It is added that the ap-

pellees do not contend that the burden was not on them to establish invalidity in order to prevail.

The surcharge, the penalty and punitive action, and the seasonal rate which the appellees sought to enjoin by their action and which were enjoined by the judgment of the district court appear in Rate Schedule W-S adopted by the board of directors of the district on January 4, 1956, and declared effective as of January 1, 1956, with a reservation that it would not apply through 1956 and 1957 to nonconserved air-conditioning equipment which had been actually connected to the district's water system on or before April 30, 1956. All equipment installed after April 1956 was subjected to the rate.

The schedule to the extent necessary to state it here provides that, in addition to the regular charges at the applicable rates, a surcharge shall be made of $36 a ton of capacity for water-cooled air-conditioning where the unit does not have water-conserving equipment. The surcharge is allocated one-third each to the months of June, July, and August of each year. No surcharge shall be made if nonconserved air-conditioning equipment is installed but has been physically disconnected from the plumbing system. If there is a reconnection at any time before September 1 of any year the annual charge for the year will be made. If new installations are made prior to June 30 of any year the full surcharge shall be applicable; if made between July 1 and August 1 the surcharge shall be two-thirds of the total; and if made between August 1 and September 1 the surcharge shall be one-third of the total.

It is this that the appellees contend is arbitrary, unreasonable, unjust, oppressive, and discriminatory. They contend this on substantially the following grounds: (1) The surcharge is not based upon units of service rendered but upon the kind and character of equipment used; (2) it relates to but one type and not to all seasonal uses; (3) it amounts to a tax on equipment in

favor of the district and permits rates not based on the amount of necessary return; (4) it is prejudicial and discriminatory as to persons who installed nonconserving units prior to the adoption of the rate; (5) it imposes an illegal arbitrary charge without regard to quantity of water used; (6) it ignores the fact that the district has sufficient capacity to meet all peak demands; and (7) it discriminates against users of nonconserved equipment by excluding from the application of the surcharge industries and commercial firms whose water consumption remains steady regardless of season. This is a consolidated abstract of the stated grounds in the petition of the original plaintiff in this case.

Preliminary to a consideration of whether or not any or all of the contentions have been sustained it is here pointed out that there had been before and has been since the establishment of this surcharge a uniform graduated rate for furnishing water which depended upon the amount regularly metered and furnished to the user. All users, including each and all of the appellees, were required to pay the same rate. Also prior to and since this surcharge was established there was no other classification upon which was imposed a surcharge upon any amount or particular use of water. It is true that there were special situations under which the district furnished water for which service it received payment, but these had no relation to the questions involved herein.

To justify the surcharge, or more accurately stated, to defend against the contentions of the appellees, the district urges substantially that the use of water in nonconserving air-conditioners sets the users apart as a class of such a kind and character as to permit the exaction of a reasonable surcharge for the water used for that purpose, and that the surcharge made and the rate established were reasonable.

A large part of the record and of the briefs in this case deals with motives and motivations. It should be

said however that motives may not be allowed to control or influence unless they coincide with sound principle.

In this area it becomes clear, and about this there is no real dispute, that the district was, in the establishment of the surcharge, in a large measure motivated by a purpose to prevent the installation of additional nonconserving water air-conditioning and to encourage the installing of water-conserving equipment on existing nonconserving equipment, the contemplated design of which was to reduce prospective future necessity for enlargement of water production capacity of the facilities of the district in order to meet the demands for water during peak periods of water use. It follows therefore that the conclusion to be reached must rest upon what the record discloses or fails to disclose as to reasonable necessity rather than only motive.

The surcharge here is based, as has been indicated, on a classification of the appellees into a class separate and distinct from all other users of water of the district with the rate charged higher than the rate charged to any of the others. There is no legal bar to classification provided that a valuable service was given other and different from that furnished to the public at large, and that the charge is reasonable and is not discriminatory. See, Keystone Investment Co. v. Metropolitan Utilities Dist., *supra;* Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

The evidence on the question of whether or not this surcharge was for a valuable service other and different from that furnished to the public at large, and the further question of whether or not the surcharge is reasonable and not discriminatory is of such length that it may not be summarized herein, but from it pertinent observations, which are deemed controlling, will be made as accurately as the record will permit.

At this point it will be said that the alleged ground of invalidity in (2) herein, which embraces b, e, and i

in the plaintiff's petition, requires no consideration other than to say that the evidence is insufficient upon which to base a finding of invalidity with particular regard to the matter of whether or not what was done was reasonable. This is not to say that what is presented by this specification, if supported by competent and material evidence, could not be the basis of the kind and character of relief sought herein. In this case there is evidence as to the demands and requirements of nonconserving air-conditioners but none which furnishes a basis for a comparison of this with other customer uses, hence clearly there is no basis for anything more than speculation as to whether or not there is unreasonableness and discrimination in this respect.

Our (4), plaintiff's d, in the terms in which it is stated stands without support. If there is discrimination it is in favor of the person who installed a nonconserving unit before the adoption of the rate regulation since he is relieved from the surcharge through 1957.

As to our (1), plaintiff's a, the meaning is not clear. The surcharge is based on evidence of probable maximum daily excess use of water by a nonconserving air-conditioner over one of like capacity having conserving equipment. Whether or not this has a material bearing on the validity of the surcharge must depend upon matters which will necessarily be considered under other specifications.

As to our (7), plaintiff's j, this requires no special consideration herein. This is true for the reason that although the factual statement contained therein is quite probably true the record is insufficient upon which to base a finding that this represents true discrimination rather than proper classification.

If therefore this surcharge is found to be arbitrary, unreasonable, unjust, oppressive, or discriminatory the findings must depend upon what the record discloses as to our (3), (5), and (6), plaintiff's c, f, g, and h.

At the outset of the consideration of this phase of the

case it is pointed out that in point of fact at no time after the establishment of this surcharge was it necessary to increase the pumping capacity of the district to meet the need for nonconserved air-conditioning or for any other purpose. In 1955 there was one day on which there was a use of 120,000,000 gallons. That was the highest amount ever required before or since. The capacity was increased, which increase was completed in 1957, to 140,000,000 gallons. This was before the surcharge became effective as to those having nonconserved air-conditioning before 1956. No further increase was projected after that which was completed in 1957. It is true that engineering surveys were made, the reports of which indicate a prospective later need for expansion but these were in nowise implemented. There is nothing authentically in the record to indicate that it was the purpose of the district to apply any portion of the surcharge in payment of the capital investment involved in the increase of capacity to 140,000,000 gallons which was completed in 1957. This according to the evidence of the district amounted to somewhat more than $14,000,000.

It is made clear by the evidence that so long as the plant and facilities for distribution were sufficient no extra burden or cost over that involved in the ordinary furnishing of water to users was cast upon the district by the furnishing of water for nonconserving air-conditioners.

It was also made clear that the Missouri River was the source of the water supply of the district and that the only limit on the supply, present or future, insofar as the district is concerned was or would be the limit of the capacity and facilities of the district.

It was further made clear that the same rate for water use was charged for all water used by persons having nonconserved air-conditioning, whether used in the air-conditioners or not, as was charged to all others who did not have nonconserved air-conditioning.

It was in view of these facts and known conditions that the surcharge was imposed. As pointed out, the surcharge was $36 per ton of capacity of each conditioner.

The theory on which it is based has been reduced to a mathematical formula, although clearly it is at least in large measure hypothetical and speculative. It is true of course that in a situation such as this hypotheses and speculative considerations are not avoidable. The formula produces an appropriate surcharge of $37.25 but this was reduced to an even $36.

The surcharge was based upon 7½ percent per annum of $675, that being the part of the reproduction cost of an entire new plant attributable to the maximum use of water in a 1 ton nonconserving air-conditioning unit less the difference between the estimated revenue from water used and the commodity cost thereof or $13.35, giving a result of $37.25.

The estimated reproduction cost of the plant was $66,000,000. The calculated actual cost prior to the addition which was completed in 1957 was slightly less than $23,000,000. As pointed out the capital cost of the addition completed in 1957 was approximately $14,000,000. Whether or not this was included in the $66,000,000 cost of reproduction has not been made clear. Be that as it may the total actual cost with the completion of the added capacity in 1957 was approximately $37,000,000.

At this point the question is propounded: What was the true basis of fixation of the amount of this surcharge? One answer which has been pointed out by the district is that it was to discourage the use of nonconserved water air-conditioning and to bring about its discontinuance. This, as the record discloses, was in large measure accomplished. But as indicated this motive furnished no basis for the imposition of the surcharge, there being a lack of adequate information upon which to base a declaration that this use repre-

sented a classification to which the district could apply a separate and distinct charge.

The design could not properly have been to make a rate charge for a use for which a rate had not been previously charged. The record discloses that the standard meter rate was made for all water used. The record fairly discloses that in delivery of this water no loss was entailed. In fact it is pointed out without controversy that so long as sufficient plant and capacity exist, the use of water in nonconserving air-conditioning equipment insofar as relative cost of operation is concerned adds no burden.

In the light of what has been said with reference to past, present, and future, if the design was to impose this as a current operating charge it was patently discriminatory.

In the light of well-established principles the surcharge was not only discriminatory but was unreasonable and accordingly unenforceable.

It is true, as has been pointed out by section 14-1015, R. R. S. 1943, that the board of directors of the district has the power and authority to determine what shall be a reasonable water rate for any particular service. This power and authority is not however without restrictions.

The general rules are set out in 12 McQuillin, Municipal Corporations (3d Ed.), § 34.97, p. 299, as follows:

"The rule forbidding unjust discrimination has been variously expressed: The charges must be equal to all for the same service under like circumstances. A public service corporation is impressed with the obligation of furnishing its service to each patron at the same price it makes to every other patron for the same or substantially the same or similar service. It 'must be equal in its dealings with all.' It 'must treat the members of the general public alike.' All patrons of the same class are entitled to the same service on equal terms. 'The law will not and cannot tolerate discrim-

ination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none.' 'A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all.' 'All should be treated alike; equality of rights requires equality of service.' 'The duty owed to all alike involves obligations to treat all alike.' 'The common law upon the subject is founded on public policy which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same service rendered under the same circumstances.'

"The numerous cases on this subject all tend to establish the same general principle, that those engaged in serving the public cannot make unreasonable and unjust discrimination, either in service or rates, among their patrons. Discriminations between patrons by a public service company, including discriminations as to rates, are invalid, provided the discrimination is an unjust one, * * *."

Section 35.37, p. 686, from the same text, contains the following which has the effect of making the general rules applicable to the situation under examination in this case:

"Where a municipality owns its water or light works, it is settled that it has the right to charge rents against consumers who make use of its service, just as does a privately operated public utility. However, the rates must be reasonable, although the municipality may charge a rate which will yield a fair profit, and need not furnish the supply or service at cost; and the same rules in regard to the reasonableness of rates apply as in case of the rates of private companies owning a public utility. * * * Otherwise stated, where the municipality owns its plant, the rates for water, light or any other product, furnished by it must be fair, reasonable and just, uniform and nondiscriminatory. The same rules enforced against public service corporations in these respects, as herein already stated, are applied with full

force to the municipality. Judicial review may usually be had as to the reasonableness of the rates."

The principles thus declared are supported by the decisions of this court and of courts of other jurisdictions. See, Western Union Telegraph Co. v. Call Publishing Co., *supra;* American Water-Works Co. v. State ex rel. Walker, *supra;* Hoover v. Deffenbaugh, *supra;* Annotation, 50 A. L. R. 126.

It cannot well be gainsaid that if the record disclosed that the furnishing of water for use in nonconserving air-conditioning equipment was a service materially other and different from general use, which was more costly to render for any reason, and a charge was made on that account which was not unreasonable or discriminatory, it would be sustained. In determining validity this and all other elements bearing upon costs would be proper subjects of consideration in arriving at a rate charge.

In the instance here however, as has been several times indicated, there is no evidence that surrounding conditions which have or will in the foreseeable future come to pass will ratably increase the cost of this service over that which prevails in the area served by the district.

As against this the district urges that it is entitled to charge for the water used and in addition thereto make and collect this surcharge which in effect would be in the nature of a partial amortization of the costs of reproduction of the district's existing plant and facilities.

This theory may not on the record be sustained for two reasons. The first is that there is an absence of evidence that the other users of water were in any manner likewise burdened. The second is that there is nothing to indicate that it would be so allocated, but on the contrary it is reasonably inferable that it would become simply part and parcel of regular operating revenue. This would clearly be a discrimination against the users of water passing through nonconserving air-

conditioners. The application of this theory would be clearly discriminatory whether applied to a valuation of $66,000,000, $37,000,00, or $22,000,000.

The only other basis advanced to support the surcharge is that it was reasonable and proper as a provision to be exercised in anticipation of a future need and necessity for expansion of the plant and production capacity of the district to meet the requirements of nonconserving air-conditioning equipment and the normal requirements of service attendant upon the growth and expansion of the area to be served by the district.

It shall not be the purpose here to say that the district does not have the legal right in the anticipation of future expansion to make some provision therefor out of the revenues obtained from current operations. On the other hand it is not the purpose to say that it does have such right. That question is not being passed upon herein. Assuming however that it does have such right it must be said that reasonably one group of users may not be singled out and the provision made to attach to it to the exclusion of others, or if it is attached to all it may not be attached unequally.

In the light of what has been said it is clear that if the district purposed to and was in its overall operations so anticipatorily functioning, the users of nonconserving air-conditioning were being subjected to it on an equal basis with all others and in addition and alone these users of nonconserving air-conditioning were subjected to the surcharge. As has been pointed out, as to relative cost of current operation and absence of evidence of a valid basis for separate classification, no justification for the surcharge can be found. It was clearly discriminatory.

The record, on the theories considered herein, substantiates the contention of the appellees that the imposition of the surcharge is oppressive, discriminatory, and unreasonable, and accordingly its validity may not be sustained.

For the reasons herein set out the judgment of the district court is affirmed.

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

LINCOLN SERVICE AND SUPPLY, INC., APPELLANT, V. LOUIS LORENZEN, DOING BUSINESS AS LORENZEN FERTILIZER COMPANY, APPELLEE.

107 N. W. 2d 333

Filed February 3, 1961. No. 34877.

1. **Contracts: Pleading.** In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made.
2. **Pleading: Trial.** A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. In order that a recovery may be had in an action the pleadings and the proof must agree.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Kenneth H. Dryden, for appellant.

Luebs, Elson & Tracy, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

WENKE, J.

Lincoln Service and Supply, Inc., a corporation, brought this action in the district court for Buffalo County against Louis Lorenzen, doing business as Lorenzen Fertilizer Company. The purpose of the action is to recover a judgment against the defendant for the contract price of a tank car of nitrogen solution in the sum of $2,510.05. Trial was had to a jury and, upon the issues raised and evidence adduced, it returned a verdict for the defendant. Judgment was entered on the verdict dismissing plaintiff's petition. Plaintiff filed

a motion for new trial and this appeal was taken from the overruling thereof.

Appellant Lincoln Service and Supply, Inc., will be herein referred to as plaintiff; appellee Louis Lorenzen will be herein referred to as defendant; and Allied Chemical and Dye Corporation will be herein referred to as Allied.

Plaintiff did not object to nor, in his motion for new trial, make any complaint about the instructions given by the trial court in submitting the cause to the jury. It has always been the rule of this court that in order to obtain a review of a question in this court, other than one of jurisdiction, the party complaining must have presented the question fairly and fully to the court below. See, Creighton v. Newton, 5 Neb. 100; Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

Plaintiff is a Nebraska corporation with its principal place of business located in Grand Island, Nebraska. It operates under the trade name of Lincoln Pellett Size Fertilizer. Its main business is the manufacturing of chemically combined dry fertilizer but it also acts as a distributor for manufacturers in the nitrogen field, including Allied. Plaintiff had a contract with the Nitrogen Division of Allied to that effect covering a period from July 1, 1957, to June 30, 1958. Defendant had been operating as a dealer in commercial fertilizers of this type in Shelton, Nebraska, since 1956. However, in the fall of 1957, he installed the necessary equipment to become a manufacturer and distributor thereof.

On December 28, 1957, plaintiff, through Jack Richards, its sales supervisor in its Grand Island office, took an order from Don Flory, field representative of Allied, for one 10,000-gallon tank car of Allied 28 percent nitrogen solution to be sent to defendant. Richards thereupon called Ralph Hill, who takes orders for the Nitrogen Division of Allied, and directed him accordingly. Nitrogen Division of Allied thereupon shipped a tank

carload of such fertilizer to defendant which defendant received and placed in his storage tank but for which he refuses to pay plaintiff. Thereafter, on November 6, 1958, plaintiff brought this suit. As a basis for recovery plaintiff alleged that: "* * * on December 28, 1957, this plaintiff under the trade name of Lincoln Pellett Size Fertilizer sold and delivered to defendant herein, at defendant's special instance and request certain goods, wares and merchandise, consisting of a ten thousand gallon tank car of nitrogen solution for the agreed and reasonable value of $2510.05, * * * that demand has been made for the payment of said account on this defendant which said demands have been refused; that plaintiff is entitled to recover from defendant the sum of $2510.05."

Plaintiff offered evidence to the effect that sometime between December 25 and 31, 1957, Don Flory, field representative of Allied, contacted defendant by telephone about filling his (defendant's) storage tank with fertilizer; that defendant agreed to take a tank car of fertilizer if he could get it on a consignment basis as per terms of a distributor's contract (meaning the distributor's contract between plaintiff and Allied); that by such terms it was to be paid for by defendant as he disposed of it but not later than June 15, 1958; that Flory then called Jack Richards, plaintiff's sales supervisor, and advised him of this arrangement; that Richards thereafter contacted Ralph Hill, order taker for Nitrogen Division of Allied, and directed him to send a tank car of nitrogen solution to defendant; that the Nitrogen Division of Allied did so; that the contract price thereof was $47.80 per ton; that defendant received the tank carload of nitrogen solution and put it in his storage tank; that defendant has disposed of all of the nitrogen solution; that demand for payment of the contract price has been made upon defendant; and that defendant has failed and refused to pay the contract price or any part thereof.

Defendant admits that he received the tank carload of nitrogen solution shipped by the Nitrogen Division of Allied for which plaintiff here seeks to recover the contract price and that he has never paid therefor, although demand has been made upon him to do so, but denies ever having ordered it from plaintiff or anyone else but says he received it under an arrangement with Allied for storage and because of that fact does not owe plaintiff therefor. In support of this defense he adduced evidence to the effect that in the early part of December 1957, after he had completed the installation of the equipment hereinbefore referred to, Don Flory, field representative of Allied, Homer Dudley, sales representative of Allied, and Frank Snyder, chemist for Allied, came to his place of business in Shelton; that they approved his storage facilities; that they then discussed with him the proposition of Allied sending out a tank carload of nitrogen solution for storage in his tank; that it was agreed Allied would immediately send him a tank carload of such solution for that purpose; that Allied was to pay him $3 per ton for the storage thereof and for any additional such solution it would distribute through his tanks; that settlement therefor was to be made at the end of the year; that arrangements were made for the payment of such solution if he disposed thereof; that one carload was sent by the Nitrogen Division of Allied under this arrangement; that he received such carload and placed it in his tanks; and that he has never settled with Allied for this carload of nitrogen solution nor has Allied settled with him for the storage thereon.

Without going into further detail, of which there is a great deal, it becomes evident that there is a dispute between the parties as to whether or not plaintiff sold and delivered this nitrogen solution to the defendant at defendant's special instance and request for the agreed price of $2,510.05. The trial court specifically submitted this issue to the jury by its instructions

Nos. 1, 5, and 7. Instruction No. 7 was properly given under our holding in Sorenson v. Townsend, 77 Neb. 499, 109 N. W. 749, to the effect that: "In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made." See, also, Olsen v. Collins, 75 Neb. 749, 106 N. W. 784. On this disputed issue the jury found for defendant.

But plaintiff contends the trial court, when it made a motion for that purpose, should have instructed a verdict for it on the basis that defendant was liable to it under an implied agreement to pay the contract price for the merchandise he had received and that failing to do so resulted in prejudicial error. Howard L. Peterson, manager of plaintiff, was, over objection, permitted to testify that the contract price was the fair and reasonable value of the nitrogen solution.

Here plaintiff's petition alleged an express contract for the purchase of the merchandise shipped, that is, that it was done at defendant's specific instance and request. Evidence was adduced by plaintiff to that effect. No attempt was made to amend the pleadings for the recovery on the basis of an implied agreement. We think the court was correct in submitting the cause to the jury on that basis for we have always held that in order to recover the allegations and the proof must agree. See, Talbott v. City of Lyons, *ante* p. 186, 105 N. W. 2d 918; School Dist. No. 145 v. Robertson, *ante* p. 176, 105 N. W. 2d 735; Casford v. City of McCook, 133 Neb. 191, 274 N. W. 464. As stated in School Dist. No. 145 v. Robertson, *supra:* "In order that a recovery may be had in an action the pleadings and the proof must agree. * * * A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. * * *." Consequently a plaintiff may not plead a cause of action on an express agreement and then, over objection, prove and recover on a cause of quantum meruit. See, United States Rubber

Co. v. Grigsby, 113 Neb. 695, 204 N. W. 817; Kirkendall, Jones & Co. v. Davis, 41 Neb. 285, 59 N. W. 915.

Plaintiff contends defendant was permitted to testify, over objection, to negotiations he had with third persons, representatives of Allied, which were not had in the presence of and were had without the knowledge of its representatives. Ordinarily this contention would have merit but here plaintiff adduced evidence to the effect that it was a distributor of Allied, offering in evidence its contract with the Nitrogen Division of Allied to that effect; that Don Flory, field representative of Allied, obtained the order from defendant and they agreed to the terms and conditions thereof; that the terms and conditions thereof related to the distributor's contract which plaintiff had with the Nitrogen Division of Allied; and that the shipment was made pursuant to and under the terms of the order which Flory had taken. Under this situation it was proper for defendant to show all of the facts substantiating his view of the agreement with representatives of Allied, including Flory, under which he claims he consented to the carload of nitrogen being shipped to him by Allied. We find no merit to plaintiff's contention in this respect.

Plaintiff also contends that defendant is estopped to deny he purchased the merchandise for the purchase price of which recovery is here sought. It is true defendant received the merchandise but that does not estop him from showing what he claims to be the basis upon which he received it. See Sorenson v. Townsend, *supra*. Since that basis, if true, would prevent plaintiff from recovering, the question of which version is true was for the jury and is not one of law for the court.

We find plaintiff has had a fair trial upon the cause of action which it pleaded as a basis for its right to recover and, in support of which, it adduced the evidence that it did. In view thereof we affirm the action of the lower court.

AFFIRMED.

JAMES D. CONWAY, APPELLEE, V. COUNTY OF ADAMS, NEBRASKA, APPELLANT.
107 N. W. 2d 418

Filed February 10, 1961. No. 34819.

1. **Trusts.** The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if it is not in conflict with law.
2. ———. Rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when the language used clearly expresses the settlor's intent.
3. ———. Where an instrument creating a trust declares the trust estate to be personal property, and the declaration does not conflict with law, it has binding force and effect.

APPEAL from the district court for Adams County: NORRIS CHADDERDON, JUDGE. *Reversed and remanded with directions.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton,* and *Donald L. Brock,* for appellant.

Cline, Williams, Wright & Johnson, Richard N. Thompson, Conway & Irons, and *John N. Marvel,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by James D. Conway, plaintiff and appellee, against the County of Adams, defendant and appellant, to recover $55.04 paid as taxes levied by the county assessor of Adams County on certain property for the year 1958. The plaintiff's position was that the tax was void for the reason that the property was not subject to tax in the State of Nebraska. He paid the tax and in due course made claim for refund. Refund was denied whereupon this action was instituted. There was a trial to the court on a stipulation of facts, which has been preserved as a bill of exceptions. At the conclusion of the trial judgment was rendered in favor

of the plaintiff and against the defendant. From this judgment the defendant has appealed.

It is apparent from the record that on and prior to December 1, 1955, Deerfield Gas Production Company, a Delaware corporation, and Kearney Gas Production Company, a Delaware corporation, were engaged in the production and sale of natural gas and the development and operation of certain oil and gas leases covering lands located in what was known as the Hugoton Field in the State of Kansas. Apparently on December 1, 1955, these two companies transferred all of their interest to another company known as Kansas-Nebraska Natural Gas Company, Inc., except that they retained a share of a certain gas production payment. This share of the gas production payment was conveyed in trust to The Central National Bank and Trust Company of Topeka, Kansas. This was in amount 6 cents a thousand cubic feet of gas produced in the area. Thus it appears that Kansas-Nebraska Natural Gas Company, Inc., became obligated to pay the Deerfield Gas Production Company and the Kearney Gas Production Company 6 cents a thousand cubic feet of gas produced. In turn the right to receive the payments was conveyed to the trustee. The placement in trust was for the purpose of sale of that which was reserved. It is reasonably inferable that the proceeds of sale, after expenses, went to Deerfield Gas Production Company and Kearney Gas Production Company.

To carry out the purposes of the trust, that is the disposition by sale of this 6 percent interest in gas production payments, the interest was divided into 935,999 separate and undivided units.

The plaintiff, a resident of Adams County, Nebraska, was on March 1, 1958, the owner of 1,529 of these units and was entitled in the proportion that these units bore to the total of 935,999 to participate in the 6 percent interest in the gas production payments.

The tax involved here was on these units. The amount

is not in controversy and it is not questioned that the units were held by the plaintiff in Adams County, Nebraska. The question for determination is that of whether or not the units were an interest in real estate in the State of Kansas. The district court held that they were and on that ground held them not taxable in the State of Nebraska. The defendant contends otherwise, hence the appeal to this court.

The factual description and legal status of the property on which the tax was assessed and levied must be ascertained from the contents of what is denominated "Trust Indenture Hugoton Gas Trust," which is in the bill of exceptions, together with appropriate inferences and applicable legal principles. In this respect the parties are in accord. This instrument will be referred to as the indenture.

If interests of the owners of the units are to depend upon the description thereof contained in the indenture which was creative of those interests, it must follow that these units were personal property and not interests in real estate. This matter has not been considered by the parties in their briefs but it is of such significance under law that it may not with propriety be disregarded.

In Article IV of the indenture the instruments of conveyance of the units are denominated "Certificates of Beneficial Interest." Section 2 of the article contains the following which is declaratory of the status of these units of interest in the trust: "Said Certificates are and shall be held and construed to be in all respects personal property and shall in no wise pass to or vest in any owner or holder thereof or his heirs, devisees or assignees thereof as real estate and said Certificates shall be bequeathed, assigned, disposed of and distributed as personal estate."

The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if

it is not in conflict with law. County of Holt v. Gallagher, 156 Neb. 457, 56 N. W. 2d 621. See, also, Roats v. Roats, 128 Neb. 194, 258 N. W. 264; Scully v. Scully, 162 Neb. 368, 76 N. W. 2d 239. There is nothing in the record to indicate that the expressed intent contained in the indenture is in conflict with law.

In the case of County of Holt v. Gallagher, *supra,* it is pointed out that rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when, as in this case, the language used clearly expresses the settlor's intent.

In instances where the instrument creating the trust declares the character of the trust estate, that is, if it is declared to be personal property, and does not conflict with law, the declared intent has binding force and effect. The general rule is stated in 90 C. J. S., Trusts, § 186 (a), p. 79, as follows: "Whether the interest of a beneficiary is an interest in real property or in personal property depends on the provisions of the trust instrument. * * * The interest of beneficiaries who have, under the terms of the trust agreement, no right, title, or interest in the realty as such, either legal or equitable, but only an interest in the earnings and proceeds with power to direct the trustee to deal with the title and manage and control the property, and the right to receive proceeds from rentals, which right is to be deemed personal property, is personal property only and not real estate." See, also, Smith v. Bank of America Nat. Trust & Savings Assn., 14 Cal. App. 2d 78, 57 P. 2d 1363; Wright v. Security-First Nat. Bank, 35 Cal. App. 2d 264, 95 P. 2d 194; Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P. 2d 501; Liberty Nat. Bank v. Kosterlitz, 329 Ill. App. 244, 67 N. E. 2d 876.

In the light of this it becomes clear that it became and was the duty of the district court to accept the clearly declared intent contained in the indenture, which was that the units of interest were personal property and not

real property. As personal property they were taxable in Adams County, Nebraska.

The rules applicable to situations where there is doubt as to the meaning of description contained in instruments creating trusts, which rules were presented by the briefs, were entitled to no consideration.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to render judgment in favor of the defendant and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

FREEPORT MOTOR CASUALTY COMPANY, A CORPORATION, APPELLEE, V. MCKENZIE PONTIAC, INC., A CORPORATION, ET AL., APPELLANTS.
107 N. W. 2d 542

Filed February 10, 1961. No. 34852.

1. **Subrogation.** A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect.
2. **Bailments.** A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee.
3. **Negligence: Evidence.** Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence.
4. ———: ———. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of.

5. **Automobiles: Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Reversed and remanded with directions.*

Lawrence R. Brodkey, for appellants.

Ross & O'Connor, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

WENKE, J.

Freeport Motor Casualty Company, a corporation organized and existing under the laws of Illinois, brought this action in the district court for Douglas County against McKenzie Pontiac, Inc., a Nebraska corporation, Roderick E. McKenzie, and Thomas Record. Plaintiff, for its cause of action, alleges that it insured John F. Bergmann's 1955 Pontiac Catalina coupé automobile against comprehensive loss or damage; that while said policy was in force Bergmann's automobile was stolen while in the possession and custody of defendants for repair; that said car was totally demolished; that said theft and resulting damage to Bergmann's automobile were caused by the defendants' negligence; and that as a result of the Bergmann automobile being stolen and demolished plaintiff was required to pay Bergmann, under the terms of its policy, the sum of $1,397.50, which it herein seeks to recover. Trial was had to a jury upon the issues raised by the parties. However, at the conclusion of the trial, plaintiff moved for a judgment against the defendants on its rights as subrogee of John F. Bergmann. This motion the trial court sustained and rendered a judgment for the plaintiff in the sum of $1,397.50, with interest at the rate of 6

percent from date thereof against each of the defendants. Defendants, and each of them, thereupon filed a motion for new trial. This appeal was taken from the overruling thereof.

John F. Bergmann, at all times herein material, lived in Plattsmouth, Nebraska, where he owned and operated an appliance business and filling station. We shall hereinafter refer to him as Bergmann. He and his mother, Clara Bergmann, owned a 1955 Pontiac Catalina coupé automobile which was insured by appellee. On Friday, May 31, 1957, Bergmann took this automobile to appellant McKenzie Pontiac, Inc., located at Twenty-fourth Street and Deer Park Boulevard in Omaha, Nebraska, to have seat covers put on and the differential repaired.

Appellant McKenzie Pontiac, Inc., a Nebraska corporation, is apparently owned by appellant Roderick E. McKenzie, to whom we shall hereinafter refer as McKenzie. McKenzie had incorporated the business he was conducting at Twenty-fourth Street and Deer Park Boulevard in Omaha as McKenzie Pontiac, Inc. Appellant Tommy Record, a mechanic and to whom we shall hereinafter refer as Record, was at that time working for McKenzie Pontiac, Inc., and had been working for McKenzie since November 1948. McKenzie was primarily operating a used car business at this point but was also operating a limited repair service in connection therewith for his customers.

Bergmann left the automobile with Record, who was a friend of his. Bergmann testified that when he left the automobile with Record he noticed a carnival company had set up for operation on a vacant lot about one-half to three-quarters of a block north of the intersection of Twenty-fourth Street and Deer Park Boulevard. During the afternoon of Saturday, June 1, 1957, while the Bergmann automobile was still in the possession and custody of appellants, it was stolen and thereafter, later

that same day, damaged beyond repair. As a result appellee paid the Bergmanns the sum of $1,650.

The foregoing is only intended to be a general statement setting forth the relationship of the parties and of what happened. We shall set out the facts in greater detail in connection with our discussion and disposition of the errors complained of.

Appellants claim appellee affirmatively alleged a legal liability to pay Bergmann but failed to prove that was true, contending a mere volunteer cannot maintain an action based on subrogation. We said in Scandinavian Mutual Ins. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 258, 177 N. W. 178, that: "A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect." Assuming, but not deciding, that what appellants claim is true and that appellee acted in the capacity of a volunteer in paying the Bergmanns, we still think appellee can maintain the action for in the "Release" signed by both Bergmann and his mother, when they acknowledged having received from appellee the sum of $1,650, is the following provision: "* * * said Company (appellee) * * * is hereby subrogated to all rights of recovery which the assured (Bergmanns) may have * * * against any * * * person or persons on account of said loss or damage, * * *."

"A bailee of a chattel for the mutual benefit of the parties to the bailment or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee." Federal Ins. Co. v. International Harvester Co., 164 Neb. 698, 83 N. W. 2d 382. See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551; Nagaki v. Stockfleth, 141 Neb. 676, 4 N. W. 2d 766; Carty v. Lemmon Auto Co., 72 S. D. 559, 37 N. W. 2d 454. Bergmann's contract with appellants for the repair of his automobile was one of bailment for hire and

appellee, as subrogee of the Bergmanns, has, as such, whatever rights the Bergmanns may have had against appellants under the foregoing principle.

In its petition appellee alleges, "that the defendants, and each of them, were (specifically) negligent in each of the following particulars, * * * (b) In parking John F. Bergmann's automobile across the street from the premises used by McKenzie Pontiac, Inc. (c) In leaving the car keys in the automobile of John F. Bergmann when it was parked unattended across the street from the premises of the McKenzie Pontiac, Inc. * * *."

"A litigant who charges his adversary with negligence has the burden throughout the litigation to establish it." Federal Ins. Co. v. International Harvester Co., *supra.* See, also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., *supra;* Thrasher v. Greenlease-Ledterman, Inc., 208 Okl. 507, 257 P. 2d 795.

"In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648. See, also, Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711. Of course, as we have often said, the mere happening of an accident does not prove negligence. See, Bowerman v. Greenberg, *supra;* Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299.

Appellants contend the court erred in holding them guilty of negligence as a matter of law and, in fact, contend the evidence adduced is insufficient to raise an issue of fact, in that respect, for a jury. In considering these contentions the following have application:

"If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every

controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. See, also, Moncrief v. Interstate Transit Lines, 129 Neb. 168, 261 N. W. 163.

"Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court." Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

"Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and prudent person would have done under the existing circumstances." Blanton v. Michael, Swanson & Brady Produce Co., 138 Neb. 883, 295 N. W. 883.

"The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances." Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610.

The evidence is not in material dispute. There was evidence adduced to the effect that on Friday, May 31, 1957, Bergmann took his automobile to McKenzie's place of business at Twenty-fourth Street and Deer Park Boulevard in Omaha, Nebraska, to have seat covers put on and the differential repaired; that he turned his automobile over to Record, an employee of McKenzie Pontiac, Inc., for that purpose; that Record agreed to perform these services, for which a charge was made and collected; that Record had the seat covers put on by others but repaired the differential himself; that when he had completed the repairs he road-tested the job and then, because there was no parking space available in the garage where he worked, he parked it on the premises of the Skelly Oil Company service station just across

the street north from McKenzie Pontiac, Inc., leaving the keys on the sun visor above the driver's seat; that he parked it there after 4 p.m.; and that at that time there were four attendants on duty at the station.

There is evidence to the effect that for about 11 years McKenzie had made arrangements with whomever operated this service station for permission to park automobiles thereon whenever he had insufficient room for that purpose in his garage, which had only one service stall. He further testified that under this arrangement that if automobiles were parked there during the daytime they had to be left unlocked with the keys in the automobile, but not in the ignition, so the attendants on duty at the filling station could, if necessary, move any automobile parked there. Bergmann, who had been an employee of McKenzie when he operated in Plattsmouth as McKenzie Motors and for a short time in Omaha at Twenty-fourth Street and Deer Park Boulevard after McKenzie ceased his operations in Plattsmouth, became acquainted with this operation and the manner in which it was done. There were always three, four, or five attendants on duty at the station when it was open for business, which it was until about 10 p.m. However, automobiles that were to be left parked overnight had to be locked.

Record testified he parked the Bergmann automobile on the Skelly Oil Company service station grounds and then returned to the place of business where he worked. He then called Bergmann on the telephone and told him his automobile was ready and for him to come and get it. This was about 4:30 p.m. When he had completed doing so he looked out of the window to see if the Bergmann automobile was still where he had left it but discovered it was gone. That was about 10 minutes after he had parked it. The automobile had been stolen, and was found later that evening near Nebraska City, Nebraska. When found it had been in an accident, ap-

parently rolling over three or four times. It was damaged beyond repair.

Appellants attempted to introduce evidence to show why automobiles were parked at this particular service station and the manner in which it was being done; and that it was being done in the same manner as it was being done by others in the same business under similar circumstances in that area and in Omaha generally. When, over objection thereto, this evidence was excluded proper offers of proof to that effect were made. We think, under our holding in O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123, the court erred in so ruling. Therein we said: "Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence." See, also, Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N. W. 2d 90, 149 A. L. R. 1164. As stated in Munger Automobile Co. v. American Lloyds of Dallas (Tex. Civ. App.), 267 S. W. 304: "All of the circumstances surrounding the manner and method that appellant used to protect the cars left with it for repair, and the success or failure which it had accomplished by the methods used in protecting property from theft, were admissible before the jury, in order that the jury might determine from all the facts whether appellant exercised ordinary care to prevent the automobile committed to its care from being stolen." Evidence coming within the scope of the foregoing principles should have been admitted and the trial court was in error in excluding it.

We think the evidence adduced presents a factual situation for a jury as to whether or not appellants were negligent in what they did and not one of law for the court. We find the trial court erred in this respect but do not agree with appellants that it does not present a question for a jury.

Appellants claim the trial court was in error in holding, as a matter of law, that their conduct was the proximate cause of the theft and destruction of the Bergmann automobile; in fact, they contend the evidence adduced was insufficient to support a jury finding to that effect. This contention is primarily based on the fact that there was no direct evidence adduced to show that the thief or thieves, who stole the automobile, used the key or keys that had been left in the car on top of the sun visor to perpetrate the theft.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." Hersh v. Miller, 169 Neb. 517, 99 N. W. 2d 878. See, also, Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825.

"A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. See, also, Hersh v. Miller, *supra*.

Appellants' primary fault, in so contending, lies in the fact that they seek to apply the circumstantial evidence rule applicable only in criminal cases. See Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112. Therein we held the circumstantial evidence rule applicable in civil cases to be as follows: "Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act complained of."

From the facts and circumstances proved, together

with the inferences that may be legitimately drawn therefrom, we think a jury could find that the key or keys left in the automobile by Record were the means used by the thief or thieves to start the automobile when they stole it from the place where it had been parked by Record.

Bergmanns' right to recover, as far as the measure of damage is concerned, is, under the situation disclosed by the evidence adduced, as follows: "In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident." Dorn v. Sturges, *supra*. See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Helin v. Egger, 121 Neb. 727, 238 N. W. 364. The appellee, having only the rights of the Bergmanns, is limited accordingly. Competent, relevant, and material evidence for the purpose of establishing the damage to the Bergmanns' automobile should be admitted. The trial court, over objection, received evidence adduced by appellee which was clearly incompetent for this purpose while it excluded competent evidence offered by appellants for that purpose.

We have come to the conclusion that appellants were and are entitled to a new trial. We therefore reverse the order of the trial court overruling their motion for that purpose and remand the cause to the district court with directions that appellants be given a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

OREN CLARY ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, APPELLEE.

107 N. W. 2d 429

Filed February 10, 1961. No. 34875.

1. **Eminent Domain.** The purchase of land for a right-of-way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation insofar as damages by reason of construction are concerned.
2. ———. It is now the settled law of this state that for all injuries which arise on account of the proper construction or future operation of an improvement, an adjoining landowner must be compensated in the original condemnation proceedings.
3. ———. The owner of adjoining land is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but also for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration, where channel changes are involved, the contingency of erosion.

APPEAL from the district court for Garden County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Baskins & Baskins, for appellants.

Clarence A. H. Meyer, Attorney General, and *Harold S. Salter,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This is an action brought to recover equitable relief and damages caused by erosion occasioned by the diversion of a watercourse. Judgment was rendered for defendant. Plaintiffs appeal.

Plaintiffs Oren Clary and Naomi Clary, husband and wife, hereinafter referred to as appellants, are the owners of Section 15, Township 15 North, Range 42 West of the 6th P. M., Garden County, Nebraska. This section was acquired by Oren Clary through descent from his parents, Morse P. and Lou C. Clary. On Feb-

ruary 7, 1939, Morse P. and Lou C. Clary gave an option to the Central Nebraska Public Power and Irrigation District, hereinafter referred to as district, for a right-of-way across said section. On May 4, 1939, Morse P. and Lou C. Clary executed and delivered a warranty deed to said district, conveying title to the right-of-way. The right-of-way was secured by the district for the purpose of relocating U. S. Highway No. 26, hereinafter referred to as highway, which was being inundated by the construction of McConaughy Dam across the North Platte River.

When completed, the district, in accordance with agreements, gave the new highway across appellants' land to the State of Nebraska. It then became a part of the state highway system.

Appellants present two questions: First, the liability of the State for damages for the obstruction of a natural watercourse; and second, whether the provisions of the deed constituted a bar to recovery.

Appellants contend that the district, being a public power and irrigation district organized under S. F. 310, Laws of Nebraska 1933, chapter 86, page 337, now sections 70-601 to 70-672, R. R. S. 1943, had no authority to exercise the power of eminent domain to acquire real estate for the construction of a highway. The question is material on the availability of presumptions attendant to the conveyance of property to one having the power of eminent domain. The right-of-way in question was not acquired by condemnation proceedings but by purchase.

This exact question was raised against this same district in a condemnation relating to this same highway in Feltz v. Central Nebraska Public Power & Irr. Dist., 124 F. 2d 578. In that case, the Circuit Court of Appeals for the Eighth Circuit determined that the district was a qualified licensee under the Federal Power Act, 16 U. S. C. A., § 791a et seq., and as such licensee had the power of eminent domain for the purpose stated. The

question, therefore, as to whether the Nebraska statutes giving the district power to condemn are sufficiently broad to cover a condemnation for the relocation of a highway to be covered by the dam, which we do not decide, is immaterial herein. We have no quarrel with the law of eminent domain cited by appellants. We do question its applicability to the facts herein.

The trial court found that there was no improper construction in the relocation of the highway. There is not one iota of evidence in the record indicating improper construction, except as it may be inferred from the fact that erosion did occur. Suffice it to say that appellants had the burden of proof on improper construction. They have not sustained that burden.

In Snyder v. Platte Valley Public Power & Irr. Dist., 140 Neb. 897, 2 N. W. 2d 327, we said: " 'It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings.' " We also held in that same case that: "The purchase of lands for a right of way in lieu of condemnation carries with it all of the incidents of eminent domain or condemnation in so far as damages by reason of construction are concerned."

In Psota v. Sherman County, 124 Neb. 154, 245 N. W. 405, we said: " 'The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance.' "

In the instant case, the option agreement, exhibit 23, referred to an attached plat. The deed, exhibit 22, contained the following language: "Plats of the above

described tracts of land *are attached hereto and made a part hereof.*" (Italics supplied.) The plat which is material herein is exhibit 18. It shows the proposed channel change.

Applying the principles announced above to the present case, it would seem that the new channel construction shown on the plat attached to the deed was a necessary improvement for the purpose of properly maintaining the highway. We therefore hold that there can be no question but that the acquisition in the instant case contemplated a diversion of the old channel.

We do not agree with appellants that the term "damage" is related only to the construction of the highway, but hold, under the facts in this case, that the channel change was appurtenant to the construction of the highway. The deed, exhibit 22, recites: "The above named consideration includes payment to the grantors *for damages sustained by reason of the occupation and construction on said real estate by* The Central Nebraska Public Power and Irrigation District and their successors and assigns." (Italics supplied.)

Under the well-settled law of this state, it must be presumed that appellants' predecessors in interest were compensated, or at least had an opportunity to be compensated, for all damages that could reasonably be contemplated, including the contingency of erosion.

We conclude that the trial court was correct in holding that appellants could not recover. The judgment of the trial court should be and it hereby is affirmed.

AFFIRMED.

LORIN R. SUMMERVILLE, APPELLANT, V. NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, ET AL., APPELLEES.

LORIN R. SUMMERVILLE, APPELLANT, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, APPELLEE, NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, INTERVENER-APPELLEE.

107 N. W. 2d 425

Filed February 10, 1961. No. 34878.

1. **Attorney and Client.** Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.
2. ———. An allowance for attorney's fees and expenses in such cases can only be made after the services have been rendered, the litigation has been successfully terminated, and a determination made that actual benefit has accrued to others in the class.
3. **Attorney and Client: Judgments.** A petition for an allowance of attorney's fees and expenses in such cases is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original judgment.
4. ———: ———. A petition for an allowance of attorney's fees and expenses in such cases may be filed after the expiration of the term at which the original judgment was entered.
5. **Attorney and Client.** The right to an allowance of attorney's fees and expenses in such cases is not waived by a failure to include a request for such an allowance in the original petition.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded.*

Atkins & Ferguson and *Clark G. Nichols,* for appellant.

Lyman & Winner and *W. H. Kirwin,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

This proceeding was commenced by the filing of an

application for the allowance of attorney's fees and expenses from a fund that was alleged to have been rescued and preserved as a result of the litigation in which the 1957 Weather Control Act of Nebraska was determined to be unconstitutional and void in Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748. The parties in this proceeding are identical with the parties in the former appeal.

The decree of the district court in the original action declared the statute in question to be unconstitutional and void; enjoined the county treasurer of Scotts Bluff County, Nebraska, from disbursing any of the taxes levied by the defendant Weather Control District; and retained jurisdiction of the cause for the distribution of such taxes in the hands of the county treasurer.

The appellant, who will be referred to herein as the plaintiff, filed his application for the allowance of attorney's fees and expenses on April 2, 1960. The mandate of this court was filed in the district court on April 4. On April 19 the plaintiff served a notice of hearing on the application upon the attorneys of record for the appellees, who will be referred to herein as the defendants.

The application was heard on May 10, 1960, and taken under advisement. On May 23 the district court found that it was without jurisdiction "at this late date" to grant the application of the plaintiff for the allowance of attorney's fees. The plaintiff then perfected an appeal to this court.

The plaintiff's assignment of error is that the trial court erred in finding that it was without jurisdiction to grant his application.

The parties agree that where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable

fees to the litigant's counsel. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489.

The trial court did not assign any reason for its finding that it was without jurisdiction. The defendants argue that the trial court had no jurisdiction for the reason that the plaintiff filed his application after the expiration of the term at which the original decree was rendered. The record does not show when the various terms expired but, for the purpose of this opinion, we have assumed that the plaintiff's application was filed at a term after the term in which the original decree was rendered.

The defendants further argue that since the original decree ordered the defendants, or one of them, to pay the costs of the action, the court cannot at a subsequent term make an allowance of attorney's fees and expenses from a fund created, preserved, or protected by the litigation which resulted in the original decree. The defendants state that if the court were to grant the plaintiff's application, the court would be modifying a judgment after term when its jurisdiction had expired.

The defendants have confused the allowance of expenses and attorney's fees from a fund rescued or preserved by litigation with the award or taxation of costs as between adversary parties. It is true that as to the latter the court after term has but limited power with respect to changes or modification in the taxation and award of costs. Rehn v. Bingaman, 152 Neb. 171, 40 N. W. 2d 673.

The allowance of expenses and attorney's fees to a litigant who has carried on litigation at his own expense which results in the rescue and preservation of a fund in which a number of parties will share is a different matter and is governed by different principles. The allowance of the fees and expenses requested by the plaintiff is a matter that is dependent, in the first instance, upon the litigation being successful. It is a matter which, properly, is not before the court until the

litigation has ended. In Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836, the court said: "Where one goes into a court of equity, and takes the risk of litigation on himself, and creates or protects a fund to a share in which others are entitled, those others will not be permitted to lie back and share the results of these successful labors without contributing their due share. But this rule is based on the theory that all in the class benefited should contribute to the expense. Their share of the expense is dependent entirely upon the success of the litigation. It necessarily follows that no liability for attorney's fees and expenses accrues until the litigation has been successfully terminated with actual benefits accruing to others in the class. If the litigant is unsuccessful, no benefit to others in the class accrues and he must undergo the fate of any other unsuccessful litigant; that is, pay the costs and expenses himself. We know of no rule, nor have we found any case, that authorizes the allowance of attorney's fees and expenses in a case such as we have before us, on any basis other than that of benefits accruing as a result of successful litigation. * * * At the time the allowances were made in the instant case, it had not been determined whether the litigation was beneficial to other bondholders for the reason that there had been no final determination of the matter. We are of the opinion that the trial court could properly allow attorney's fees and expenses in connection with services rendered that were beneficial to other members of the class, but that its attempt to allow expenses and attorney's fees for work to be done in the future is without authority of law. Such allowances against others similarly situated being based upon the benefits received by them, there is nothing upon which to base such an allowance until the services have been performed and the resulting benefits, if any, determined."

When the mandate of this court had been filed in the district court, the litigation had ended and it was

then proper for the plaintiff to request that an allowance of expenses and attorney's fees be made.

In Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184, the United States Supreme Court held that a plaintiff was entitled to petition the district court for an allowance of counsel fees and expenses after the mandate had been received and after the expiration of the term at which the decree had been entered. The court said: "Without considering the historic authority of a court of equity in such matters, the District Court deemed itself powerless because foreclosed by the mandate in Ticonic Bank v. Sprague, *supra*. The general proposition which moved that Court —that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest—is indisputable. Compare Kansas City Southern Ry. Co. v. Guardian Trust Co., 281 U. S. 1. But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See In re Sanford Fork & Tool Co., 160 U. S. 247; Ex parte Century Indemnity Co., 305 U. S. 354. Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before the Circuit Court of Appeals nor before this Court. Its disposition, therefore, by the mandate of either Court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal places such a claim in much better

perspective than it would have at an earlier stage. Such are the considerations which underlay the decision in Trustees v. Greenough, 105 U. S. 527, in holding that an order allowing costs 'as between solicitor and client' was a final judgment for purposes of appeal because 'the inquiry was a collateral one, having a distinct and independent character.' We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits. * * * Finally, we must notice the separate ground taken by the Circuit Court of Appeals on the basis of what it deemed the requirements of terms of court. The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity, but the ruling of the District Court here in question was made prior to the operation of the new Rules. Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late—falls."

We believe that the reasoning of the court in Sprague v. Ticonic Nat. Bank, *supra*, is controlling in this case. The district court erred in finding that it did not have jurisdiction to consider the application of the plaintiff for the allowance of attorney's fees and expenses.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SECURITIES ACCEPTANCE CORPORATION, A DELEWARE CORPORATION, ET AL., APPELLANTS, V. ROBERT M. BROWN, APPELLEE.

107 N. W. 2d 540

Filed February 17, 1961. No. 34832.

SUPPLEMENTAL OPINION

Master and Servant. One of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment, and that an employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment, for his own benefit or that of a rival, to the detriment of his former employer.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. On motion for rehearing. See *ante* p. 406, 106 N. W. 2d 456, for original opinion. *Former opinion clarified. Motion for rehearing overruled.*

Matthews, Kelley & Stone and *Baskins & Baskins*, for appellants.

McGinley, Lane, Shanahan & McGinley, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

WENKE, J.

Appellants, in their motion for rehearing, contend this court erred in holding the provisions of paragraphs V, VI, and VII of the parties' contract of employment unenforcible because the contract does not contain a provision limiting the area in which such restrictions are to apply. These three paragraphs are set out in full in our original opinion. Appellants base their contention on the claim that at common law one of the implied terms of a contract of employment is that the employee, after he has left his employment, is under an implied obligation not to use or disclose to others any trade secrets or other confidential information which

he has acquired in the course of his employment to the detriment of his former employer and that such implied obligation is neither limited as to time nor area except as the parties may do so by their contract of employment.

This contention was not presented to this court when the cause was originally presented for our consideration and, because of that fact, would not ordinarily be considered when presented for the first time on a motion for rehearing. However, because of the fact that our opinion, as now written, could be misleading in this respect, we think it desirable to file a supplemental opinion for the purpose of clarification.

Insofar as paragraphs V, VI, and VII of the parties' agreement relate to trade secrets or confidential information, we think the principle hereinafter stated is applicable and our opinion, insofar as we held these provisions were "unenforcible because there is no limitation on area" was in error. The principle above referred to is stated in 165 A. L. R. at page 1454, under the annotation of "Employee-Confidential Information" as follows: "* * * one of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment, and that therefore an employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment, for his own benefit or that of a rival, and to the detriment of his former employer." See, also, Junker v. Plummer, 320 Mass. 76, 67 N. E. 2d 667, 165 A. L. R. 1449; Byrne v. Barrett, 268 N. Y. 199, 197 N. E. 217, 100 A. L. R. 680; Westervelt v. National Paper & Supply Co., 154 Ind. 673, 57 N. E. 552; H. B. Wiggins Sons' Co. v. Cott-A-Lap Co., 169 F. 150; Witkop & Holmes Co. v. Boyce, 61 Misc. 126, 112 N. Y. S. 874, 131 App. Div. 922, 115 N. Y. S. 1150; Robb v. Green (1895), 2 Q. B. D. 1, affirmed in

2 Q. B. D. 315. It should, of course, be understood that the parties can contractually provide to limit this common law duty, which the parties did here as to time.

If the above common law duty has been violated then injunction would be available. See, 35 Am. Jur., Master & Servant, § 100, p. 529; Annotation, 165 A. L. R. 1457, Employee-Confidential Information; Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. N. S. 260; Westervelt v. National Paper & Supply Co., *supra;* Witkop & Holmes Co. v. Boyce, *supra;* Robb v. Green, *supra.*

What relief, if any, should be granted depends upon the facts and circumstances of each case. We do not think, from the evidence here adduced, that any injunctive relief is proper. We think what the court said in H. B. Wiggins Sons' Co. v. Cott-A-Lap Co., *supra,* is here applicable. Therein the court said: "If the injunction issues, it means that hereafter no man can work for one and learn his business secrets, and after leaving that employment engage himself to a rival in business, without carrying on his back into that business the injunctive mandate of a court of equity. There is nothing whatever in the facts of this case, except opportunity to do wrong and a suspicion in the mind of the rival that wrong will be done. The remedy asked for is an extraordinary one, and should not be lightly indulged in. The chancellor ought never to come into such a frame of mind that he assumes human nature to be essentially and inherently evil. Furthermore, the danger of irreparable injury is not manifest."

The other contention raised in appellants' motion for rehearing is without merit. With the foregoing clarification we adhere to our original opinion and overrule appellants' motion for rehearing.

FORMER OPINION CLARIFIED.

MOTION FOR REHEARING OVERRULED.

EMMA OLSON, APPELLEE, V. ADOLPH L. FEDDE ET AL., APPELLANTS, IMPLEADED WITH HAROLD L. CAMP ET AL., APPELLEES.
107 N. W. 2d 663

Filed February 17, 1961. No. 34858.

1. Adverse Possession. The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
3. ———. The title to land becomes complete in the adverse occupant when he has maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years.
4. ———. When a fence is constructed as a boundary line fence between two properties and the parties concerned claim ownership of the land to the fence during the statutory period without interruption in their possession or control during that time, they will acquire title by adverse possession to any land that was improperly enclosed with or added to the land they owned at the time the fence was constructed.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Kenneth H. Dryden and *J. Karr Taylor*, for appellants.

Smith & Lebens and *Claude D. Lutton*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action brought by Emma Olson as plaintiff, in the district court for Cass County, against Adolph L. Fedde and Mary Ann Fedde, husband and wife, Harold L. Camp, and all persons having or claiming any interest in and to a tract of land described in the plaintiff's petition. The purpose of the action was to quiet title to said tract of land in the plaintiff, to enjoin the defendants from entering upon or using the land, to

enjoin the defendants from claiming any right, title, or interest in and to such land, and for damages.

The trial court found generally in favor of the plaintiff and against the defendants; that the plaintiff was the owner of the real estate described in her petition; that she has been in actual, continuous, peaceable, open, notorious, exclusive, and adverse possession thereof for more than 10 years under claim of ownership and during all of that time had asserted title to the premises against all persons; that the plaintiff was entitled to a decree quieting title in her; and that the plaintiff was entitled to a permanent injunction against the defendants. In addition the trial court found in favor of the plaintiff and against the defendant Adolph L. Fedde in the sum of $300, being $2.50 a rod for 120 rods of fence; and that the costs be taxed to the defendants Adolph L. Fedde, Mary Ann Fedde, and Harold L. Camp. Judgment was rendered accordingly.

The defendants Adolph L. Fedde and Mary Ann Fedde filed a motion for new trial which was overruled. The defendants Fedde perfected appeal to this court.

The plaintiff alleged in her petition that she was the owner of a tract of land in the southeast quarter of the southwest quarter of Section 4, and in the north half of Section 9, all in Township 12 North, Range 10 East of the 6th P. M., Cass County, Nebraska, more particularly described as follows: "Commencing at the Northeast corner of the Southeast Quarter of the Northwest Quarter, Section Nine, Township Twelve North Range Ten East; thence South 0° 00', 141.9 feet to the northerly right-of-way line of the C. B. & Q. Rail Road; thence South 45° 14' East, 117.9 feet; thence N. 11° 51' East, 785 feet more or less to the southerly bank of the Platte River; thence Northwesterly along said river bank 2100 feet more or less to it's intersection with the C. B. & Q. right-of-way; thence southeasterly along the C. B. & Q. right-of-way to the North line of the Southeast Quarter of the Northwest Quarter in

Section 9, Township Twelve North, Range 10 East; thence East along said North line 131.9′ to the point of beginning; containing 21 acres more or less."

The plaintiff further alleged that she had been in actual, open, notorious, exclusive, adverse, continuous, and peaceable possession of all of said lands for more than 50 years last past; and that for more than that period of time neither the defendants nor any of them had been in possession of any part of said premises or asserted any claim thereto. The petition further alleged that the defendants Fedde were the owners of property immediately adjoining property of the plaintiff on the east; and that the defendant Harold L. Camp was either their tenant in possession or agent for the purpose of moving sand and gravel.

As a second cause of action, the plaintiff alleged that through the use of heavy equipment, the defendants had destroyed trees, grass, and vegetation on the land of the plaintiff as heretofore described, and prayed for damages.

The answer of the defendants Fedde denied all of the allegations contained in the plaintiff's petition not admitted; admitted ownership and described the land east of the land described in the plaintiff's petition; and admitted further that said defendants had leased a portion of said property to defendant Harold L. Camp for mining sand and gravel. The prayer was for an award of immediate possession by them of the land described in the plaintiff's petition and that title thereto be quieted in these answering defendants.

The defendant Harold L. Camp, by answer, denied each and every allegation contained in the plaintiff's petition; alleged that he had a lease from defendant Adolph L. Fedde on land adjoining the property described in the plaintiff's petition; that he was given specific permission by defendant Adolph L. Fedde to go upon the land described in the plaintiff's petition and did so under such defendant's direction and control; and

that the defendants Fedde were the owners of said property described in the plaintiff's petition and were entitled to lease said property to this answering defendant. The prayer was for a dismissal of the plaintiff's petition.

The plaintiff's reply to the answer of the defendants Fedde, and for reply to the answer of Harold L. Camp, denied each and every allegation contained therein except such allegations or parts thereof as admitted the truth of plaintiff's petition.

It was stipulated by the parties that a jury trial of any damage or law issues be waived.

The trial court rendered a default judgment in favor of the plaintiff and against all the defendants who had been properly served and had failed to answer or appear. That such can be properly done if the facts so justify, see Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774. See, also, Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

For convenience we will refer to the defendants as Feddes, and to Adolph L. Fedde on occasion as Adolph Fedde; to the plaintiff as plaintiff or Emma Olson; and to the other persons by their first or last names, eliminating the middle initial.

The defendants assign as error that the trial court erred in finding generally for the plaintiff and against the defendants on the first cause of action, and against the defendant Adolph Fedde on the second cause of action, and in finding that the plaintiff was the owner of the land in controversy and had been in adverse possession of the same for a period of 10 years or more.

While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the wit-

nesses and their manner of testifying. See, Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670; Worm v. Crowell, *supra*.

"The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. * * * The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted." Worm v. Crowell, *supra*. See, also, Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

For actual possession, no particular act is required. What is sufficient to meet the requirements depends upon the character of the land and all of the circumstances of the case. See Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

Counsel for the parties consented that the trial court view the premises. This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight. See, Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813.

With the foregoing rules in mind, we proceed to a summary of the facts in the instant case.

On January 30, 1891, Otha J. Wortman acquired title by warranty deed to "Government Lots 3, 4 and 5 and the SW¼ of NW¼ and the NE¼ of SW¼ and SW¼ of SE¼ of Sec. 9, Twp 12 N., Rge 10 E. of 6th P. M., in Cass County, Nebraska. Subject to the B & M R R Co's right of way." The Burlington & Missouri River Railroad Company acquired a right-of-way over a part of this land 150 feet wide running along the south bank of the Platte River in 1869. This railroad later became the Chicago, Burlington & Quincy Railroad, referred to in this opinion as the Burlington.

On October 13, 1903, Otha J. Wortman et al. conveyed to Emma Olson (plaintiff) the "South East ¼ of the North West ¼ and the North East ¼ of the

South West ¼ of Section 9 - Town 12 - Range Ten in Cass County Nebraska."

On April 1, 1904, Otha J. Wortman et ux., by warranty deed, conveyed to Axel Nelson the following described land: "Lots Four (4) and Five (5) and the Southwest quarter (SW¼) of the South East Quarter all in Section Nine (9) Township Twelve (12) Range Ten (10) East of the Sixth Principal Meridian, * * * Also the west Sixteen and twenty seven hundredth (16.27) acres of Lot five (5) in Section Ten (10) Town Twelve (12) Range Ten (10) East of the Sixth Principal Meridian."

On April 1, 1904, Otha J. Wortman et ux., by quitclaim deed, deeded to Axel Nelson "All that part of the East half of Section Nine (9) Township Twelve (12), Range Ten (10) East of the Sixth Principal Meridian lying North of the right of way of the Burlington and Missouri River Railroad, including the island in the Platte River in said Section."

On January 5, 1950, Raymond P. Nelson et al., by warranty deed, deeded to George I. Gade et ux. the land described as follows: "Fractional Southeast Quarter (SE¼) of Section Nine (9) Township Twelve (12) Range Ten (10) East of the 6th P. M., Cass County, Nebraska, more particularly described as Lots Four (4) and Five (5) and the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of said Section Nine (9) * * *; and the West 16.27 acres of Lot Five (5) Section Ten (10) Township Twelve (12) Range Ten (10) East of the 6th P. M. Cass County, Nebraska."

On January 5, 1950, Raymond P. Nelson et al. deeded to George I. Gade et ux., by quitclaim deed, "That part of the East Half of Section Nine (9) Township Twelve (12) Range Ten (10) East of the 6th P. M., Cass County, Nebraska, lying North of the right of Way of the Burlington Railroad, including island in the Platte River in said section; also the land that lies North of the West 16.27 acres of lot 5, Section 10, Township 12,

Range 10, Cass County, Nebraska, which land is North of the right of way of Burlington Railroad."

On December 30, 1955, George I. Gade et ux. deeded to Adolph L. Fedde et ux., "The fractional Southeast Quarter (SE¼) of Section Nine (9), Township Twelve (12) North, Range Ten (10) East of the Sixth Principal Meridian more particularly described as Lots Four (4) and Five (5) and the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of said Section Nine (9), * * *; and the West 16.27 acres of Lot Five (5) of Section Ten (10) Township Twelve (12) North, Range Ten (10) East of the Sixth Principal Meridian, * * *."

On December 30, 1955, George I. Gade et ux., by quitclaim deed, conveyed to Adolph L. Fedde et ux., "that part of the East Half of Section Nine (9) Township Twelve (12) Range Ten (10), East of the Sixth P. M., Cass County, Nebraska, lying North of the right of way of the Burlington Railroad, including island in the Platte River in said section; also the land that lies North of the West 16.27 acres of Lot 5, Section 10, Township 12, Range 10 East of the Sixth P. M. Cass County, Nebraska, plus all land accreted to the above described property, which land is North of the railroad right of way of Burlington Railroad."

The above description of lands constitutes the history of conveyances up to the time this case was heard. The land acquired by Emma Olson, plaintiff, is west of the land acquired by Axel Nelson, now the Fedde land. What is designated as Nelson Island is the land over which this controversy arises, and Nelson Island, as it is commonly referred to in the record, is northwest of the Burlington right-of-way and of the Olson and Fedde land.

The defendants Fedde contend that the conveyance to them constituted them as the owners of the record title to the land in dispute in this case, and that the plaintiff has no claim to such land by adverse possession.

A survey was made of Sections 4 and 9, Township 12

North, Range 10 East of the 6th P. M., in Cass County, Nebraska, about June 13, 1958. On the surveyor's first visit over the area, a standing fencepost was pointed out to him. This post was standing about 4 feet out of the ground. He and the group with him walked along the area toward the river where they found a cottonwood tree that had been used as a fencepost. This tree was about 36 inches in diameter. There was barbed wire buried in the bark of the tree, and the bark had grown over the wire. The wire was old and rusty. The wire in this cottonwood tree extended to the north and south, and was not much more than a foot in length. Also, to the south was found another fencepost lying on the ground with barbed wire in it, and other posts on the ground which were obviously fenceposts. Approximately 30 to 40 feet north of the cottonwood tree the surveyor found an old east-west fence. The posts were broken and rotted, and the wires were lying on the ground. He found no definite line or designation on the terrain or in the area to show a continuation of the north-south section line. He further testified that he was unable to sight the half-section line north and south from the center of the section south of the Burlington railroad with any degree of accuracy because south of the right-of-way was a steep bluff, heavily wooded. He further testified that the plot he surveyed consisted of approximately 21 acres.

The plaintiff lived on her 80 acres of land with her husband George Olson until his death in 1928. Her son-in-law, Martin Stenberg, moved to the farm in 1929, took over the management of the farm, and the plaintiff lives with him. The plaintiff was 94 years of age at the time of trial. Axel Nelson, the plaintiff's brother, and his wife Emma lived on the Nelson farm until Axel Nelson's death on April 20, 1939. On June 21, 1948, Emma Nelson died. There were three sons, Raymond, Elmer, and Allen, who are Axel Nelson's heirs at law.

Martin Stenberg testified that he moved to the Olson farm in February 1929; and that before he moved to the farm he visited the plaintiff and his father-in-law and was on the land in dispute prior to the time he was married in 1921. He further testified that there was a sandpit on the land in dispute before he moved on the farm; that he first observed this sandpit in 1923 or 1924; that there were railroad tracks in the vicinity of the sandpit about 200 or 300 feet south of the big cottonwood tree; that there was a spur used to haul gravel and sand from the sandpit to the Burlington main line; that this sandpit was on the Nelson property and belonged to the Moffett Sand and Gravel Company; that there was a lease between the plaintiff and the sand company, and the company paid the plaintiff rent for the use of a part of the property in dispute; that the only names on the lease were those of the Moffett Sand and Gravel Company, the plaintiff, and possibly George Olson; that said company obtained its fuel supply from a supply tank along the railroad; and that in 1923, there was a cement platform built along the railroad tracks which is still there. This witness further testified that before he moved onto the farm there was a channel that practically followed the railroad tracks. He first observed this channel in 1919. The sand company put in a dike above the spur and across the channel, and the dike is still in place. After the spur was taken out, the grade where the spur had been was used as a road. The character of the ground to the south, west, and northwest of the channel consisted of underbrush, grass, and weeds, and the only time there was any water over this land was at flood stage. At one time there were a number of channels in that area, which filled up. This witness and his brother cut cottonwood trees and felled them into the river to help fill up the channel. After he moved onto the farm in 1929, he observed a three-strand barbed-wire fence running north and south across this island. This fence constituted the boundary

line between the Olson and Nelson farms. In 1958, this witness erected a fence in the same place as the old fence, which ran straight north to the river. The old fence consisted mostly of split railroad ties, some cedar posts, and wire. There was a gate across the old spur south of the big cottonwood tree. He further testified that it was impossible to sight the half-section line when standing on the railroad tracks because of the heavy trees in that area; that he cut wood in the area, and sold it to purchase groceries; that the land in dispute could not be cultivated from 1921 to 1936, because it was low land and heavily timbered; and that from 1936 until the time he built a new crossfence in 1958, running in the same direction as the crossfence built in 1926, the land was used for the purpose of pasturing, hunting, fishing, and obtaining wood, the purpose for which it had always been used and for which it was adapted. He further testified that a man named Fulton operated a sawmill on this land off and on for a year, and received permission to do so from the plaintiff.

This witness further testified that he had known Axel Nelson since 1919, and during that time Axel Nelson never made any claim to the land in dispute, nor did the Nelson heirs, nor did George Gade; and that Adolph Fedde made no claim to this property prior to the time some bulldozing was done on the land in dispute in 1958. This witness further testified that he knew both Masser and A. J. Cianciola who had a cabin in the area north and just east of the crossfence; that in September or October 1957, Adolph Fedde asked this witness for permission for one Jay Enright to drive through the land to hunt on Moss Island, to the north of the land in dispute, and this permission was granted; and that in 1958, defendants Camp and Adolph Fedde talked to this witness about extending the spur on the land in dispute and were told that there had been a spur in that locality, and suggested that Camp talk to the plaintiff and to him about this matter. He further testified

that to his knowledge no one asked the plaintiff to cease her possession of this land, nor made any claim to it; that no effort was ever made by the plaintiff to hide her claim to the land in dispute and she at all times acted as the owner of this land; that people could see what this land was used for; and that it was continuously used for the purpose for which it was adapted. He further testified that there was a gate at one time from Olson's deeded land across the railroad right-of-way; that this was before 1929; that this witness helped George Olson take horses down the bluff, across the railroad tracks, and onto the land in dispute; and that at that time Axel Nelson had no stock on such land. This witness further testified that when he first knew the land in dispute the island, which has been referred to as Nelson Island, was on the property of Wortman, or Gade, or Nelson, and through the years worked west until it became one large island; that originally the big cottonwood tree marked the end of Nelson Island; that the crossfence was put in to keep Axel Nelson's cattle from going onto the Olson property and Olson's horses from going onto the Nelson property; that in 1929, there were no fences along the river north of the crossfence; that there was a fence built by George Olson along the railroad right-of-way; and that Axel Nelson had fences along the boundary of his land. In 1936, Axel Nelson asked this witness if he could use the wire on the crossfence to fence the north side of his land. This witness testified relative to a sawmill which he discussed with a man named Castin. This witness received rent for permitting the sawmill to be on the premises in dispute in the form of 124 2 x 6 boards. He informed the operators of the sawmill where to set their operation, and the place that they should stop the work. He further testified that he took horses and cattle and hauled wood from the land in dispute through the Nelson place; that while George Olson was alive, none of Nelson's cattle ran west of the crossfence where Olson

had his horses; and that west of Nelson Island, referred to also as the big island, where the crossfence was located, there were channels and small islands where George Olson used to pasture his horses and cattle.

Paul Olson testified that the plaintiff is his mother; that he was born in 1905, and lived on the Olson land with his parents until 1928, and has been on this land many times since 1928; that he knows Stenberg and of his occupancy of the Olson farm since 1929; that he hunted and fished on the land in dispute with his brother and Stenberg; that during 1924, he worked for the Moffett Sand and Gravel Company, and continued such work through the summer of 1925; that the spur was removed; and that he saw his father, George Olson, build the crossfence in May or early June 1926, in the same location as the new crossfence built by Stenberg in 1958. He recalled the gate over the spur, and also that he helped his father cut wood in the area in dispute, and trapped on this land. He further testified that the wire was in the crossfence 10 or 12 years, and most of the posts were there until 1942; that his mother claimed to be the owner of the land west of the crossfence and north of the tracks of the Burlington; that Axel Nelson owned the land east of the crossfence; that from 1928 to 1936, the land in dispute was used for pasturing, hunting, and fishing, and from 1936 to 1958, for grazing, hunting, and fishing; that Axel Nelson, until the time of his death in 1939, made no claim to the land west of his property-line fence; that from this witness' earliest memory he knew of no complaint about the plaintiff claiming such land or of the use of the land in dispute; that no one claimed ownership of this land other than the plaintiff; and that at the time the crossfence was built, the channel had been filled in.

Otto Olson testified that prior to 1925, he lived with his parents on the Olson farm. He further testified that he first saw the crossfence in 1926, running south from the cottonwood tree to the railroad, and observed the

gate across the spur; that he knew Axel Nelson, his heirs, Gade, and Adolph Fedde, and none of these persons ever made any claim to the land in dispute from the time he knew it; that although he had left home in 1925, he returned at various times; that he took a picture of the tree on the north end of the fence constructed by his father, showing the new fence and the wire from the old fence; that the old wire on the crossfence built in 1926, runs north and south the same as the new wire on the fence built in 1958; that he went through a gate in the Burlington fence to hunt and fish on the land in dispute; that he remembered two islands, one to the east and one to the west, when he was first there, and these islands joined together; and that there was a road to the west across the tracks near the high bank which his father used to take the cattle to the land in question.

Jess Fidler testified that he worked for the Western Sand and Gravel Company, and recalled that the Moffett Sand and Gravel Company sold out to Lyman & Richey in the spring of 1926. He came into the area in dispute to remove the equipment, and the spur was there at that time. This spur was crossed by a fence. He further testified that he recently observed a new fence in the area which was in approximately the same location as the fence built in 1926. He also recalled seeing a big cottonwood tree at the end of Nelson Island, and the fence ran from that location over close to the platform built for a gasoline tank near the tracks.

Allen Nelson testified that he was born on the Nelson farm and is the son of Axel and Emma Nelson. Emma Olson, the plaintiff, is his aunt. He testified that he knew Adolph Fedde and was familiar with the land in dispute; that he lived on the Nelson farm until 1938, was gone for a year, returned in 1939, then lived on such land until 1950. He recalled that there was a fence along the Burlington track and a crossfence along the line between the Olson and Nelson farms running north and south; that old railroad ties were used for

posts for this fence; and that this fence crossed the spur. He first saw this crossfence in 1926, which was the year it was constructed, and that fence stayed there for roughly 10 years. Later the wire was removed from that fence and he helped to do this. This was done for the purpose of building a fence along the riverbank to keep the cattle from crossing the river. This latter fence was built from the crossfence, the length of the island. After his father's death in 1939, this witness became part owner of the Nelson land. Neither he nor any member of his family ever claimed any land west of the crossfence. It was claimed by the Olsons. He further testified that before 1926, his father, Axel Nelson, had fences on his land, but had no fence west of the crossfence; that the wire was taken off the crossfence and used along the north side of the island; that before 1926, his father had cattle below the east-west fence along the river, and Olson's cattle were pastured above this location; that members of his family cut wood on the east end of the land in dispute; that if wood was cut on the west half of such land by members of his family it was done to help Stenberg; that George Olson had horses and calves west of the crossfence; and that these animals were taken down on a part of the north road which was on the Olson land.

Elmer Nelson testified that he was a son of Axel and Emma Nelson and lived on the Nelson farm until 1933; that he was familiar with the land in dispute; and that he first saw the crossfence in 1925 or 1926. He recalled that there was a wire gate over the spur. He testified that Olsons pastured the land west of the crossfence; that no member of the Nelson family ever claimed any interest in the land in dispute; that the plaintiff always claimed to own such land; that the channel started to fill in 35 years ago; and that the land in dispute was not considered an island but was considered as part of the mainland.

George Gade testified that he took possession of the

Nelson property on or about March 1, 1950; that he sold this land to the defendants Fedde in 1956; and that at that time he knew that the plaintiff claimed the land west of him and north of the railroad tracks. The agent who negotiated the deal between this witness and the Feddes took him down to what is called the island. There he saw evidence of a fence, roughly in the extension of the center section line, consisting of what he thought were some posts and some wire. He further testified that he never purported to own or claim the land west of the crossfence. When he sold the land to the Feddes, Adolph Fedde wanted him to give a quitclaim deed to all of the land on Nelson Island, and he told Adolph Fedde that he would give him a deed to the land north of his place, and no more. When he bought the land from the Nelson heirs there was in fact no island, and he bought only the land lying north of his place. His cattle ran over the entire area, with Stenberg's cattle. After he was on this land 2 years, he and Stenberg built a fence along the riverbank, north of the railroad tracks, clear to the west end of the land in dispute. This was a three-wire fence, with one electric wire. He told hunters where the property line was when they came to hunt, and told Castin to take wood only from that part of the land which he owned.

The agent who negotiated the sale between Gade and the Feddes testified that he pointed out to Fedde the west property line north of the railroad tracks and told Fedde that he could obtain a quitclaim deed to all of the land east of the crossfence.

Elmer Welton testified that he knew the area in dispute; that he did a lot of trapping, hunting, and fishing in such area in 1928, and for 6 or 7 years thereafter; and that this was the way in which he made his living. He further testified that he observed the crossfence, and had to open the gate to get over the spur to get to the place where he hunted and fished; that he saw the fence erected by Stenberg in 1958, which was in the same

location as the old crossfence; that the old crossfence remained in place for 10 years; and that the wire was taken off the posts, and the posts remained and were in approximately the same place as the fence constructed by Stenberg. When going into this disputed area, he went through the Axel Nelson place. He asked Axel Nelson for permission to go upon the land in dispute, was told by him to ask the plaintiff, and he obtained permission from the plaintiff to do so.

Clarence Vandeman, who was a partner of Elmer Welton, testified that he fished with Welton in the area in dispute; that he had a recollection of a fence constructed by George Olson that ran north and south; that he also recalled the spur and the gate; and that wire was attached to a good-sized cottonwood tree. He further testified that he had been in that area in recent months and had observed the new fence built by Stenberg which was in approximately the same location as the old crossfence; that the cottonwood tree was next to the riverbank; that after the wire was taken from the crossfence he could see the old fenceposts were in the same place; that he worked for the Burlington from 1946 to 1948, and would go up and down the tracks in that area; that the last time he recalled seeing the posts of the first crossfence was sometime between 1946 and 1948; that he knew the plaintiff, and asked her permission to hunt and fish in the area in dispute; and that he and Welton went through the gate on the Nelson land then up through the gate across the spur to the area in dispute.

Wally Wagner, a railroad section worker for the Burlington since 1917, testified that he knew George Olson and knew that the old crossfence was built in 1926, as he saw George Olson building it; that he helped unload the ties that George Olson used for posts; that George Olson also built the first fence along the railroad right-of-way; that no pasturing occurred in that area until it was fenced in; and that Stenberg constructed a cross-

fence in the same location as the old crossfence. This witness further testified that he helped to build the spur, and had opened and closed the gate in the fence that was built by George Olson.

Earl Dreamer testified that he was familiar with the land in dispute; that he knew Axel Nelson and his wife, but did not know the plaintiff or her husband; that he started to go on the land in dispute in 1917, and obtained permission to do so from Axel Nelson; that in order to get to this land he went through Nelson's yard to the east gate, then to a road across the railroad tracks; that he was on this land on an average of once every two weeks from 1917, and hunted there in 1919; that in 1927, he and other persons bought a cabin which was located south of the railroad tracks at the corner of the Axel Nelson place, across from the sandpit; that he hunted and fished over the entire island; that he never saw a crossfence running north and south across the island; that he had been over this land a great many times between 1927 and 1929; and that Axel Nelson built a fence to keep the cattle out of the river in 1934. This witness further testified that he remembered two fences built by Axel Nelson at the west end of the island, the first being built in 1927, and the second one in 1930.

Oscar Neumann testified that he had known the land involved in this litigation since 1920; that when he first went on this land in 1920, he did not ask permission of anyone to do so; and that he and his father fished from this island many times. He further testified that there was a meadow at the lower end of the island and a small channel that ran between it and the Nelson main island, which channel was 100 to 150 feet wide. The first time he asked permission to go on the island was in 1924, and he obtained this permission from the Nelsons. Since 1924, he had never seen a north-south crossfence across this island. The first time he ever saw a fence, it was along the right-of-way of the railroad in the 1930's. He testified that he had never seen a footpath or road from

the Olson property down the bluff and across the railroad tracks.

William Leddy testified that he knew the Nelson family and the Olson family; that he had been acquainted with the land in dispute since the early 1900's; and that he used to go on this land to hunt and fish. He started to do so in 1903, and was on this land a number of times all through the years up until the time Gade moved onto the Nelson land. He testified that the road across the Nelson place was the only way to get to the land in dispute; that he never saw a crossfence running north and south at any of the times he was on this land; and that he never saw a gate in the right-of-way fence along the Burlington tracks. He further testified that he never asked any person for permission to go onto this land, and saw neighbors, strangers, and numerous people on this land; that there were gates across the Nelson road all of the years that he went on this land, one at the Nelson house and one at the railroad right-of-way; and that he was on this land three or four times a year from 1903 until 1950.

Edgar Sweem testified that he had been a section foreman and knew the location of the property in dispute, but did not know much about the property. He further testified that he passed this property from May 10, 1937, until February 28, 1944, for the purpose of taking care of tracks, fences, and crossings. In 1937, there was a fence along the Burlington right-of-way. He never saw a row of posts that would designate where a crossfence running north and south had been located in 1937, on the numerous times he passed over that area. He further testified that there were no gates that he saw, except at the Nelson crossing; and that he knew Stenberg fed cattle on this land after 1937.

Francis Fulton testified that he operated a sawmill in 1953, and made arrangements with Gade to do so; that Gade sold timber to Fred J. Castin, and this witness cut the logs for the purchaser; that Gade never gave

him instructions confining his work to any one part of the island, but told this witness to pick his site, and help set the sawmill up; and that he never paid Stenberg any money or lumber of any kind. Later in 1956, he did cut lumber on the land in dispute for Adolph Fedde, and dealt with him, but never with Stenberg or any other person. No one ever told this witness that Olson claimed this land.

Ralph Dreamer testified that when he lived at home he and his father went onto the land in dispute. He remembered going on this land first in 1929, and had been on this land from 1929 up until the past year, hunting and fishing. He further testified that he did not remember a crossfence running north and south since he had been on this land.

Laura A. Dreamer corroborated the testimony of her husband Earl Dreamer to the effect that at the times she was on the land in dispute with him, as he testified, she never observed or saw any crossfence running north and south across the island.

W. O. Schewe testified that he knew Axel Nelson; that he went fishing on the land in dispute before Axel Nelson bought the farm; that the island was a kind of a jungle when he first went on it; that he never saw a crossfence running north and south across the island and which was constructed in 1926; that he did see a fence at the west end of this island that was built by Axel Nelson; and that to the best of his recollection there was no road down the hill on the Olson land that lead to the land in dispute.

Harold Buell testified that he knew the Nelsons and the Olsons; and that he went on the land in dispute ever since he could remember to hunt and fish and to help when that was demanded. Between 1930 and 1934, there was a fence along the railroad tracks, and a fence on the north side of the island. He could not remember any crossfence running north and south across the island. He further testified that Stenberg and Axel

Nelson had cattle on this land in 1934 or 1935, and these cattle ranged the entire island.

Adolph Fedde testified that when he took the warranty deed and the quitclaim deed to the Nelson property, he claimed all of the land in dispute; that after he took possession he sawed timber on this land, sowed grass, and had a bulldozer move onto it on two occasions to do some riprapping; and that he and the real estate agent who negotiated the deal between Gade and this witness were over nearly all of the exterior of the land in dispute. He denied that the agent pointed out any property lines which would separate the property which he purchased from the land in dispute. He further testified that the agent told this witness he was going to sell him just what the quitclaim deed called for. This witness further testified that he entered into a lease agreement with Camp for the purpose of pumping sand on the land in dispute. Some of the fence on the north side of the island washed into the river, and before work with the bulldozer could be started some of the fence was rolled up and some of the posts removed. This fence was in bad shape. This witness further testified that Fulton went onto this land with a bulldozer and toppled some of the trees into the river. This was a year or two prior to the time that Camp entered the land to do some bulldozing on it. This bulldozing ran from east to west across the entire island, and was done in 1956 or 1957. This witness further testified that he had seen the cottonwood tree that has been described with the wire in it; that the wire in that tree protruded from the tree at right-angles to the fence which was put in there, that is, the wire was sticking out of the west side of the tree; and that there were fenceposts standing up along the riverbank, east and west of this tree. With reference to whether or not there was any evidence of fenceposts to show that there had been a north-south fence, this witness testified that there were pieces of wood and posts all over the island,

and he could ascertain no evidence of any particular fenceposts being found in the immediate vicinity that would indicate that there had been a north-south fence built, as claimed by the plaintiff. This witness further testified that he leased land on the island for cabins, and different spots for duck hunting.

On cross-examination this witness testified that the written lease he had with Camp read as follows: "through all of that land north of the tracks and the east half of the section (section 9)." He further testified that he had a verbal agreement with Camp that if he wanted to pump on the other part, if this witness was satisfied with his pumping arrangements, he would let Camp pump in Section 10, or up on the other land.

A. J. Cianciola testified that he owned a cabin in the immediate area of the property in dispute. In 1956, he leased the ground from Adolph Fedde. At that time he told Adolph Fedde he wanted the last place he had for cabin purposes as he desired privacy. Later Adolph Fedde sold him a parcel of land that was on the east side of the crossfence, and pointed out a tree as one of the things that constituted the boundary line between his property and other owners. At the same time Adolph Fedde told this witness that he had had the land surveyed and that that was the property line, and told this witness not to exceed that property line because he was not sure who it belonged to.

The evidence relating to damages may be summarized as follows: Gade and Stenberg built a 3-wire fence with two barbed wires and one smooth wire along the riverbank. The entire distance where this fence was constructed was bulldozed out by the defendants. The distance covered by the bulldozing conducted by the defendants which destroyed this fence was approximately 2,100 feet. After the fence was constructed, Adolph Fedde asked Stenberg by what right he had constructed the fence. Stenberg asked Adolph Fedde who gave him permission to move onto the land with a bulldozer and

he replied that he had given Camp permission to go onto the land with the bulldozer. When Camp entered upon the land with his bulldozer, he bulldozed right along the river, and knocked down trees west of the Cianciola cabin. The reasonable price for the fence was testified to by Stenberg to be approximately $2.50 a rod. After viewing the premises, the court awarded damages to the plaintiff in the amount of $300.

In James v. McNair, *supra,* this court said: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted."

It is the established law of this state that, when a fence is constructed as a boundary line between two properties, and parties claim ownership of land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own. See, Pfeiffer v. Scottsbluff Mortgage Loan Co., 105 Neb. 621, 181 N. W. 533; Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171; Hallowell v. Borchers, *supra;* Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714; McGowan v. Neimann, 144 Neb. 652, 14 N. W. 2d 326.

In the instant case the evidence shows that the plaintiff owned the only deeded land north of the railroad which laid north of her place. It consisted of a small triangular tract on the half section line, as shown by the surveys in evidence. This land never washed out, as the evidence shows that the channel of the Platte River came down along the railroad right-of-way, swerved away at the triangular tract, and then cut back near Nelson's crossing. This is shown by the fact that either on or in the immediate vicinity of this triangle the Moffett Sand and Gravel Company placed a concrete

platform for a supply tank on their first spur that was built, and which platform is now in existence. The original Wortman Island, later known as Nelson Island, ended at the crossfence. After the dike was put in by the people operating the sandpit, which dike was to the west, the area filled in rapidly. Therefore, the evidence discloses that the area in question was accreted to the railroad right-of-way and to the triangle owned by the plaintiff, as effectively as it was accreted to Nelson Island. George Olson built a fence in a north-south direction, starting as close to the section line as the terrain would permit, in 1926. Prior to the building of such fence and subsequent thereto, Axel Nelson never claimed any land beyond the boundary line of this fence. At all times the plaintiff claimed to own this land. Gade, who purchased the Nelson land from the Nelson heirs as the evidence discloses, never claimed to own the land in dispute.

From a review of the entire record, the evidence discloses that for a period of over 50 years no claim was ever made against the plaintiff's use of the property in dispute, and for a period of 30 years there was a fence, or evidence of a fence, indicating exactly where the claimed boundary line existed. For 10 years this boundary line running north and south was well fenced.

From an examination of the entire evidence, we are convinced that the plaintiff has been in the open, notorious, exclusive, continuous, and adverse possession of the strip of land in question for more than the statutory period of 10 years, and that she is entitled to have a decree granted showing that she is the owner of such land.

For the reasons given herein, the judgment rendered by the trial court is affirmed.

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

FRANKLIN M. PALMER, APPELLEE, V. GERALD R. MCDONALD, APPELLANT.

107 N. W. 2d 655

Filed February 17, 1961. No. 34864.

1. **Trial.** A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence.
2. ———. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
3. ———. In a case where a motion for a directed verdict has been made at the close of all of the evidence, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.
4. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
5. **Automobiles: Negligence.** When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.
6. **Highways: Negligence.** One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown.
7. **Negligence.** The rule with reference to cause which will afford the basis for an action for damages for negligence is that the

act must be a proximate cause of the accident and the ensuing injuries.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and dismissed.*

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Sarpy County by Franklin M. Palmer, plaintiff, against Gerald R. McDonald, defendant, to recover damages for injuries sustained because of the negligence of the defendant when his automobile collided with the plaintiff, a pedestrian. The cause was tried to a jury, resulting in a verdict in favor of the plaintiff. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. This motion was overruled and the defendant perfected his appeal to this court.

The plaintiff's petition alleged that on or about September 4, 1958, at about 5 p.m., the plaintiff was walking as a pedestrian from the west side to the east side of the paved street which runs generally in a north-south direction behind the building known as the Strategic Air Command Control Center at Offutt Air Force Base in Sarpy County (which will hereinafter be referred to as the headquarters building); that there was a large parking lot to the east of the headquarters building; that the street was undergoing heavy usage by pedestrians who were proceeding from the headquarters building to the parking area east of such building; that there were no marked crosswalk lines or lanes for use by pedestrians crossing this road, but by usage and

custom the plaintiff and numerous other pedestrians regularly utilized that road to cross from the headquarters building to the parking area; that this fact was well known by the defendant; and that there was a maximum speed limit of 10 miles an hour for vehicular traffic. The plaintiff further alleged that as he prepared to cross from the west to the east side of the road, there was located a long line of vehicles in a stationary position in the west half of the road; that prior to leaving the west curb of the road, the plaintiff ascertained that the southbound vehicles were in a stationary position and that there was ample opportunity and space for him to cross the west half of the road between the rear of a stopped southbound bus and a car that was southbound; that upon reaching a point approximately even with the east side of the bus, the plaintiff again made an observation to his right and left prior to entering onto the east half of the road, and ascertained that there was no north or southbound traffic located on the roadway which would constitute a danger to him; that thereafter the plaintiff proceeded into the road where he was struck by a northbound vehicle operated by the defendant; and that immediately prior to the happening of the collision, the defendant drove his car from its parking place in the parking area to the east of the road, turned his car to the north, and accelerated his car causing it to strike the plaintiff. The plaintiff then set forth in his petition several acts of negligence on the part of the defendant which the plaintiff claims constituted the proximate cause of his injuries, and prayed for damages.

The defendant's answer admitted the happening of the collision between his car and the plaintiff on September 4, 1958, which collision occurred immediately east of the headquarters building; specifically denied that the plaintiff was walking; alleged that said collision and resulting injuries and damages, if any, sustained by the plaintiff were through no fault or negligence on

the part of the defendant; and alleged that the plaintiff's negligence was the sole and proximate cause of the collision, which negligence was more than slight and directly contributed to and caused the accident.

The assignments of error necessary to consider in this appeal are that the trial court erred in overruling the defendant's motion for directed verdict at the conclusion of the plaintiff's case and at the conclusion of all of the evidence; and that the trial court erred in overruling the defendant's motion for a judgment notwithstanding the verdict.

The principal question presented on this appeal is whether or not the evidence establishes that the plaintiff was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

In determining the issues in this case, the following principles of law are applicable.

"A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence." Spracklin v. Omaha Transit Co., 162 Neb. 351, 76 N. W. 2d 234. See, also, Jarosh v. Van Meter, *ante* p. 61, 105 N. W. 2d 531.

"In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040. See, also, Jarosh v. Van Meter, *supra*.

In a case where a motion for a directed verdict has been made at the close of all of the evidence, which

motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. See, Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Jarosh v. Van Meter, *supra*.

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

The record shows that Bernhard Muhsemann testified that he was an airman first class stationed at the Offutt Air Force Base on September 4, 1958, and was assigned to a police squadron; that part of his duties required him to investigate accidents that occurred on the base; that he was familiar with the area where the collision occurred between the defendant's car and the plaintiff, a pedestrian; that the rear of the headquarters building faces to the east; that the area east, at the rear of the building, contains a large parking lot running generally in a north-south direction with numerous lines painted on the pavement to indicate parking stalls; that approximately 400 cars park in this parking area; that directly north of the headquarters building there is another parking lot that holds approximately 250 cars; and that in all, there is parking space for approximately 650 cars belonging to persons working at the headquarters building. He further testified that there is a north-south road which lies between the rear of the headquarters building and the east parking lot; that this road is approximately 30 feet wide from curb to curb; that about 95 percent of the people working in the headquarters building get off duty at 5 p.m., and leave the building; that the speed limit on the road between

the headquarters building and the parking lot was 10 miles an hour on September 4, 1958; and that there were signs posted to that effect in that vicinity as well as regulations such as a daily bulletin put out by the provost marshal's office to the effect that pedestrians had the right-of-way in that area over vehicles. There were no painted crosswalks in this area. There were three entrances on the rear of the headquarters building which open out to the parking lot. A large percentage of the pedestrians walk across the road to get to their cars. This witness further testified that he received a call that an accident had occurred at gate No. 2, which is called the pedestrian gate. He and a flight sergeant arrived at the scene of the accident shortly after it occurred. He stated that it was more or less dusk, raining, and drizzling, and that the ground was wet at that time. Arriving at the scene of the accident he saw a pedestrian sitting in the road, and a 1953 4-door Plymouth car which belonged to the defendant was stopped in the immediate vicinity. He made an investigation and found skid marks approximately 20 feet in length from the rear of the defendant's car. There was a crack in the windshield of the defendant's car. The base ambulance arrived and the plaintiff was taken to the base hospital.

On cross-examination this witness testified that he did not see the accident; that there was a line of traffic stopped at the west curb of the road; that when he arrived at the scene of the accident the plaintiff was seated on the road on the left side of the defendant's car which was facing north; and that the front end of the car was not more than 4 feet south of the gate shack west of the roadway at the rear of the headquarters building.

The plaintiff offered in evidence the deposition of Elizabeth Borsen. On September 4, 1958, she was employed and had worked in the headquarters building. On the day in question she left work at approximately 5 p.m., and walked out the rear of the headquarters building to proceed to the east parking lot where the

car she was to ride home in was parked. The driver asked her to wait until he got the car. People were "pouring out" of the headquarters building to go home. She described the weather as "lousy." She waited between the second and third crossdrives on the east side of the road in question, immediately adjacent to the parking lot. She further stated that there were 10 or 12 entrances to the parking lot; that she noticed the defendant's car come out of the southernmost entrance of the parking lot and turn north on the north-south road; and that she watched the defendant's car as it proceeded north, and in her opinion the defendant "put on a little bit too much speed." She estimated the speed of the defendant's car as he drove north to be 20 miles an hour. She continued to watch the defendant for "a little bit." She turned her head to the south to see if the driver of the car she was to ride in was coming, then she looked north again and saw the plaintiff "sort of up against or on the fender of a car that was parked" on the west curb facing south, and the plaintiff fell to the ground. She saw the defendant "fly" out of his car, having applied his brakes and stopped his car in about a car length. She heard no horn sounded by anyone prior to the accident. When the defendant's car came to a stop, the rear of his car was either even with the plaintiff or north of him.

On cross-examination this witness testified that while she was standing on the east curb watching for her ride she observed an Air Force bus stopped on the west side of the street facing south, 20 or 25 feet north of where she was standing, and there were two or three southbound cars stopped behind or to the north of this bus. Her first impression was that she saw the plaintiff's body either up against the fender or on the fender of the car parked behind the bus.

The plaintiff read into evidence certain excerpts from the defendant's deposition, that there were cars proceeding south in the area where the accident occurred.

The southbound traffic was at a halt along the west side of the road, due to the congestion at the time of the employees quitting work at the base. He judged that the distance from the left side of the Air Force bus to the left side of his car would be 2 feet. He first saw the plaintiff at the time of impact. At that time the plaintiff was crossing the road from the west side to the east side.

The plaintiff testified that he was employed as chief of the policy and procedures branch in the procurement division at the Air Force Base. On the day of the collision, he had driven his car to work and had parked it in the parking lot immediately to the east of the headquarters building. He estimated that the parking lots held 400 or 500 cars, and that 2,500 people worked in the headquarters building, and most of them left their work at 5 p.m. He testified that pedestrians had to walk across the road, and there were no designated places to walk, they could walk where they could find room between cars. Pedestrians moved directly east in going from the headquarters building to the parking lot. The plaintiff further testified that he left the rear of the headquarters building, walked to the east some distance and then turned and walked north to the checkpoint where he showed his badge to the officer stationed there. He then walked south on the sidewalk along the west side of the road for a distance of approximately 50 feet where he found an opening in a line of cars which were stopped approximately 2 feet from the curb. He saw an Air Force bus, and the body portion of that bus was about 8 feet in width. This bus was stopped about 5 feet from the west curb. He trotted along from the check station down to a point where the bus was standing. As he moved along the west sidewalk, he observed the road and saw no cars coming north on the road. When he reached a point where the bus was stopped, he found that there was an opening of approximately 4 feet between the rear of the bus and

the car standing immediately behind the bus. When he reached the east side of the bus, he looked to the south and saw that there were no northbound cars on the road. He looked to the north, and seeing no southbound traffic moving he took a step out onto the road, glanced to the south as he did so, and the defendant's car was upon him. His impression was that the front portion of the defendant's left front fender struck the inner side of his left leg above the knee and on part of the knee. He was also injured on his right side where it struck the windshield of the defendant's car. When he took the step, he saw the defendant's car, and the collision occurred simultaneously. The defendant's car was not over a foot away from him when he saw it before the impact. He believed that almost simultaneously with the impact he heard a little "peep," and assumed that it was from the horn of the car behind the bus. He did not recall hearing any horn sounded by the defendant's car. The first thing he could remember after the accident was that he was lying on his back in the road, very close to the left side of the car which was stopped behind the bus. He remembered that after the collision someone came up to George Smith, the driver of the car that was stopped behind the bus, and Smith said to that person: "you know you were driving awfully fast." He assumed that Smith was talking to the defendant, but was not sure, as he did not see the man Smith was talking to.

On cross-examination this witness testified that as he walked toward the street, cars southbound were built up solid along the west curb. As he walked down the sidewalk looking toward the south and over the roadway, he had a fairly good view of the roadway, but the bus obstructed that view somewhat. As he walked south down the sidewalk, he continued to look to the roadway and to the south to see if there were any cars proceeding north on the road. He was trotting for 50 feet until he got just to the rear of the bus, and

was walking when he stepped off the curb and put his hand on the right fender of the car to his left, which was the car behind the bus, and was Smith's car. He then passed between that car and the bus, and looked to the left edge of the bus. He looked to the south and saw no traffic approaching, and looked to the north and saw no traffic approaching from that direction. He took one step, glanced back to the south, and the defendant's car was within a foot of him. When he paused at the east edge of the bus and looked to the south he was able to see probably 200 feet to the south, and at that time he saw no northbound cars.

Lieutenant Colonel Ruth McCraw testified that she was stationed and worked in the headquarters building at Offutt Air Force Base; that she left work at 5 p.m., on September 4, 1958; and that when she left the building with her superior officer to go to her car parked in the officer's parking lot directly behind the building, it was drizzling rain. When she got her car, she came out of the parking lot and was headed south to go around the headquarters building and out toward the Strategic Air Command gate. Immediately after leaving the parking lot she was stopped in the southbound lane of traffic on the north-south road. There were a number of cars in front of her, including an Air Force bus in front of the car preceding her car. She observed the plaintiff emerging between the back of the bus and the car preceding her car. The plaintiff was in a running trot going into the street from between the bus and the car. The plaintiff was looking in her direction, and did not hesitate or stop at any time. She saw the actual impact. The plaintiff hit the defendant's car sideways, just to the rear of the left front fender of the defendant's car which was northbound. The plaintiff's head hit the windshield of the defendant's car. The plaintiff fell to the ground between the two automobiles, right in the center of the road. This witness jumped out of her car and went to the plaintiff's aid.

She held his head in her lap. The defendant's car stopped "right there" in the road. She was not particularly looking to see a car coming, and as she saw the plaintiff crossing the road she saw the defendant's car coming up the road, and then she saw the impact. The plaintiff was directly centered in the roadway in front of the left wheel of the Smith car which was directly behind the bus, and next to the front side of the car that he hit. She believed the defendant stopped his car "dead still." At no time up to and after the impact did she hear any squealing of brakes or the sounding of a horn. While she was assisting the plaintiff after the collision, she heard the defendant say: "I am sorry, Mister, I didn't see you."

On cross-examination this witness testified that the impact took place a few feet in front of her car and to the left of it; that it would not have been possible, in her opinion, for the plaintiff to have been hit by the front part of the defendant's car because she saw his glasses fly back toward and onto the hood of the Smith car in front of her car; and that she saw his head hit the windshield, which could not have happened if the plaintiff had been in front of the defendant's car.

The deposition of the defendant was read into evidence. He testified that he was involved in the accident on September 4, 1958, between his car and a pedestrian, which took place back of the headquarters building at Offutt Air Force Base between 4 and 5 p.m.; that he had been at work and was leaving for home; that he was told there was a speed limit of 15 miles an hour and that his speed at the time of the accident was less than 10 miles an hour; that he was proceeding north, there were no cars immediately ahead of him, and he did not remember if there were any cars immediately behind him; that there was traffic proceeding south in the area where the accident happened; that the southbound traffic was "full" along the west side of the road, and the cars at that point were stopped

due to the traffic congestion; and that he was proceeding north from the east parking lot and, as he approached the gate guard, the plaintiff ran from between the southbound bus and the George Smith car. The plaintiff struck the left front fender of the defendant's car right ahead of the windshield, that is, the plaintiff ran into the left side of the defendant's car. His car did not travel over 2 feet after the accident, after he had applied the brakes. He testified that he saw the plaintiff just at the time of the impact; and that the plaintiff was trotting, and could not stop his forward movement.

James W. Nanney testified that on September 4, 1958, he was assigned to an air police squadron, and part of his duties was to investigate accidents; and that he made an investigation of an accident on September 4, 1958, accompanied by airman first class Muhsemann, and was told to go to gate No. 2. Upon arrival at the scene of the accident he saw someone lying in the road in the northbound lane, just east of the guard control point. He noticed a crack in the windshield of the defendant's car. This witness further testified that neither he nor Muhsemann saw the collision and therefore did not know what position the plaintiff was in, nor the position of the defendant's car at the time of the impact. He further testified that the Air Force bus was approximately up to 7½ feet in width, and the rear of the bus was a few feet south of the plaintiff as he was lying in the roadway.

It was stipulated that the testimony of George Smith, taken by interrogatories propounded in behalf of the defendant, should be received in evidence. This witness testified that he was employed at the Strategic Air Command, Offutt Air Force Base on September 4, 1958, and witnessed a collision between an automobile and a pedestrian; that he was in his car immediately behind the Air Force bus proceeding south in the line of traffic enroute home; that it was drizzling slightly at the time

of the accident; that when he saw the plaintiff, he was just passing the sentry box and through the security gate across the sidewalk between this witness' car and the bus stopped ahead of him; that the entire southbound line of traffic was stopped; that he saw the plaintiff trotting across the sidewalk between his car and the parked bus; that the plaintiff had his head down, apparently to avoid the rain; that the plaintiff did not hesitate nor look in either direction up or down the road prior to leaving the sidewalk; and that the plaintiff was in a slow trot heading east across the street. This witness stated that he observed the defendant's car proceeding north; that the speed of the defendant's car was approximately 10 or 15 miles an hour; that this witness tapped his horn in an effort to attract the plaintiff's attention to the oncoming traffic, but the plaintiff did not heed the warning and by the time the plaintiff reached the center of the roadway the defendant's car had reached the opening between the bus and this witness' car, and the plaintiff ran into the left front fender of the defendant's car; that the point of impact occurred about 4 feet in front of and to the left of this witness' car; and that there was about 2 feet of clearance between the two lines of traffic.

The plaintiff's evidence is to the effect that when he halted at the left edge of the bus, he looked to the south and had a view of 200 feet or more and did not see any cars approaching from that direction. He then took one step, and almost instantaneously with his taking of the step, the collision occurred. The testimony of two eyewitnesses, who were in a good position to see the accident and did see it, was positive that there was no hesitation on the part of the plaintiff; that he was on a trot; and that he did not look to the right before emerging out from behind the Air Force bus. From the testimony of the two eyewitnesses, it is apparent that the defendant's car had to be at the place of impact and in plain sight. It was northbound, and its left side was

some 2 feet from the side of the Air Force bus at the time of the collision.

The following, under the facts in the instant case, are applicable.

"When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from a place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727.

The fact that there was no crosswalk across the north-south road to the parking lot to the east, and that pedestrians had the right-of-way over vehicles, does not dispense with the rule announced in Ficke v. Gibson, 153 Neb. 478, 45 N. W. 2d 436, as follows: "One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown."

While the plaintiff contends that the defendant was approaching from the south on the wrong side of the street, he did testify that when he moved out to the left side of the bus and looked to the right and left, he could see down the street beyond the bus for a block, or at last 200 feet or more, and saw no vehicles approaching; that he then looked left, took one step, looked up, and almost simultaneously saw the defendant's car; and that the front part of the left fender of the defendant's car came in contact with his body.

The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries. See Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619.

Under the factual situation in the instant case the negligence of the defendant, if any, was not the proximate cause of the accident. If the defendant's car was over the center line of the road before or at the time of the accident, such would not constitute the proximate cause of the accident under the factual situation in this case.

We conclude that the trial court erred in submitting the case to the jury. The plaintiff's own negligence, under the facts shown, precludes the recovery on his part as a matter of law. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

WALTER A. ANDERSON ET AL., APPELLEES, V. OSCAR CARLSON, JR., ET AL., APPELLANTS, IMPLEADED WITH JOHN E. CARLSON ET AL., APPELLEES.
107 N. W. 2d 535

Filed February 17, 1961. No. 34884.

1. **Constitutional Law: Judgments.** A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleadings and admissions show there is no genuine issue of fact.
2. **Statutes.** Unless such construction would be inconsistent with the intent of the Legislature in the construction of the statutes of Nebraska, when the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed.
3. ———. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.
4. **Constitutional Law.** The constitutionality of a law is to be tested by what the act authorizes and what may be accomplished by it.
5. **Constitutional Law: Statutes.** A statute vesting an arbitrary discretion in a public officer without specifying a guide or stand-

ard for the measure of such discretion violates the constitutional provision prohibiting undue delegation of legislative power.

6. ———: ———. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal upon the question of whether the property has been arbitrarily or unjustly included within the boundaries of the proposed district, is an unconstitutional delegation of legislative power and a taking of property without due process of law.

APPEAL from the district court for Phelps County: EDMUND NUSS, JUDGE. *Affirmed.*

Richard E. Person and *John E. Dier,* for appellants.

Anderson, Storms & Anderson, Stiner & Boslaugh, and *Wilbur S. Aten,* for appellees.

W. C. Conover and *Franklin D. Carroll,* amici curiae.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and SPENCER, JJ.

SPENCER, J.

This is an action to declare the Rural Cemetery District Act unconstitutional and to enjoin the collection or levy of a tax. Plaintiffs' motion for summary judgment was sustained. Defendants appeal.

The appeal presents two questions: First, whether a motion for a summary judgment is a proper pleading to raise the question of constitutionality; and second, whether the Rural Cemetery District Act, Chapter 12, article 9, R. R. S. 1943, is constitutional.

Plaintiffs, hereinafter referred to as appellees, for themselves and all others similarly situated, filed a petition, which later was amended, against the officers and directors of Moses Hill Cemetery District of Phelps County and the district; the board of supervisors of Phelps County individually and as a board; Phelps County; the county clerk; and the county treasurer. The amended petition attacked the constitutionality of

the Rural Cemetery District Act, and prayed for an injunction against defendants, hereinafter referred to as appellants, from collecting any tax or levying any future tax or acquiring any property.

The material facts are not in dispute. On March 31, 1959, petitions for the formation of Moses Hill Cemetery District of Phelps County, Nebraska, hereinafter referred to as district, were filed with the county clerk. The petitions were signed by 138 resident freeholders. A map was attached, delineating the limits of the district. At its widest points, it is 15 miles long north and south, and 12 miles wide east and west. The north 7 miles are from 2 to 8 miles wide; the south 2 miles are 5 miles wide. We make this observation to indicate that adjoining sections were not included for reasons known only to the petitioners. Appellees in their brief suggest that the driving distance from one corner to another is more than 22 miles. On March 31, 1959, pursuant to section 12-903, R. R. S. 1943, the county clerk filed in her office a certificate determining that a majority of the resident freeholders in the proposed district had signed the petition. She then designated that the petitioners and other taxpayers of the proposed district meet on April 14, 1959, at the Moses Hill Church for the purpose of completing the organization of the district. Notice of the meeting appeared in the April 1 issue of the Holdrege Daily Citizen, a newspaper of general circulation in Phelps County. At the meeting, held as advertised, officers and directors were elected for the district. On July 2, 1959, a certificate, certified by the president and secretary of the district estimating the probable expense for the ensuing year, was filed with the county clerk. On August 27, 1959, the county board of Phelps County levied a tax of .12 mills upon the assessed value of all taxable property, except intangible property, in the district for the purpose of maintaining the district for the fiscal year 1959.

Appellants strenuously urge that the constitutional-

ity of a law cannot be raised by a motion for summary judgment. The only Nebraska case cited by either appellants or amici curiae to support appellants' position on this point is Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627. No question of constitutionality was raised in that case. Further, we there stated: " 'The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.' "

Section 25-1330, R. R. S. 1943, provides as follows: "A party seeking to recover in district court upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the filing of answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Appellants insist no claim is involved, and that appellees have not asked for a declaratory judgment. They are wrong on both points. The term "claim" as used in the statute is broader than appellants' inference, and includes an action for injunctive relief. Further, the prayer of the amended petition is for a declaratory judgment or determination that the district had no legal existence.

A motion for summary judgment is proper if the pleadings and admissions show there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. § 25-1332, R. R. S. 1943.

Appellants, in their reply brief, state as follows: "It would seem that all the pertinent information which could include records showing the intent of the Legislature, the various accomplishments which have been done under the scope of the law that is then being tested, and all the other facts, should be presented to the trial judge to give him all available information upon which he may base a decision of such great importance as to decide the fate of a law enacted by our Legislature."

We hold, from an examination of the pleadings and admissions, that there is no genuine issue of fact to be determined and that a motion for summary judgment was a proper pleading herein.

We quite agree with appellants that in an act of the Legislature, all reasonable doubt must be resolved in favor of constitutionality and that if a statute is subject to more than one construction, the court will adopt the one which will make the act constitutional. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217; Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729. These rules have no applicability to the facts herein.

In order to suggest a question on construction, appellants urge that the word "shall" be interpreted as permissive in order to uphold a legislative act. With this we do not agree. It is not the function of the courts to legislate. There may be occasions where it is apparent the word "shall" may have been used by inadvertence, and the rest of the act so indicates, in which case appellants' argument would have merit. However, that is not the case here. Section 12-903, R. R. S. 1943, reads as follows: "When a petition or petitions for the organization of a cemetery district has been signed and filed in accordance with section 12-902, the county clerk or clerks *shall* determine if a majority of the resident freeholders in the proposed district have signed the same and, if he or they find that they have, certify such fact. The county clerk *shall* thereupon designate a time and place for the petitioners and other taxpayers of the proposed district to meet at a place within such district to complete the organization. Notice of such meeting *shall* be given by one publication in a newspaper of general circulation in the county; Provided, that if the proposed district *shall* be within two or more counties, the county clerk of the county, wherein the largest number of petitioners thereon *shall* reside, *shall* fix the time and place for the organization meeting after he *shall*

have conferred with the clerk or clerks of the other counties interested in regard thereto and after the other clerk or clerks *shall* have certified as to the adequacy of the petition or petitions in that county." (Italics supplied.) The word "shall" is used eight times in this section. Which ones should we consider as permissive? Only the second one, as suggested by appellants?

There is no need for speculation. Section 12-903, R. R. S. 1943, was last amended in 1947. At the 1947 session, the Legislature enacted some general rules of construction. Section 49-802, R. R. S. 1943, so far as material herein, provides as follows: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed." There is also a rule of statutory construction that: "A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears." Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N. W. 2d 700.

Appellants would have us hold that the statute imparts discretion with the county clerk to question the boundaries, or to question whether the district would promote the public health, convenience, welfare, and necessity of the signers of the petition. To so hold would be judicial legislation in which we do not intend to indulge.

Appellants suggest that appellees will place considerable emphasis on Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, and Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748, and attempt to distinguish the situation in those cases from the Rural Cemetery District Act. We note those differences, which were visually presented in argu-

ment, but find them to be immaterial on the point in question.

In Elliott v. Wille, *supra*, we held: "A legislative act, which authorizes private individuals to create and fix the boundaries of a district for public improvement, to be paid for by taxes levied on the property within the district, without any provision for determination by a competent tribunal whether the creation of the district and the construction of the improvement will promote public health, convenience or welfare, and without any provision for determination whether the owner's property has been arbitrarily or unjustly included in the district, or whether his property will receive any benefit from the proposed improvement, is invalid because it authorizes the taking of private property for a public use without just compensation and deprives the owner of his property without due process of law.

"The legislature may not delegate to private individuals either legislative or judicial functions."

In the opinion in the case of Summerville v. North Platte Valley Weather Control Dist., *supra*, filed 2 weeks after the trial court sustained appellees' motion for summary judgment, we also held: "The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals.

"Where it is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined.

"The Legislature may not delegate legislative functions to private persons."

Amici curiae, in support of appellants' position, devote the major portion of their brief to the attempt to show that an adequate tribunal exists under the Rural Cemetery District Act. They suggest the board of equaliza-

tion is such a tribunal. What issue may the taxpayers present to the county board of equalization? Gerrymandering of boundaries? Arbitrariness of the inclusion of their property? Whether the district as a whole will benefit the public health, convenience, welfare, or necessity? Whether inclusion of their property does not benefit the public health, convenience, welfare, or necessity?

Section 77-1606, R. R. S. 1943, provides for an appeal from the county board of equalization if "* * * the levy is for an unlawful or unnecessary purpose, or in excess of the requirements of a county, * * *." May the levy be for a lawful and necessary purpose as to a portion of the district and yet not be for the complaining taxpayer? The answers to these questions are obvious. Certainly the arguments made by amici curiae are ingenious, but at best illusory, and serve to show the absolute failure of the act to afford petitioners the remedies necessary to meet constitutional requirements. We hold the act does not provide a tribunal to review the rights of property owners included within the district.

If we were to interpret section 12-903, R. R. S. 1943, as contended for by appellants, we would have an act fixing an arbitrary discretion in a public officer without specifying a guide or standard for the measure of such discretion. This would violate the constitutional provisions prohibiting undue delegation of legislative power and the taking of property without due process of law.

In passing, we note appellees' suggestion that there is no requirement in section 12-903, R. R. S. 1943, for notice of the organization meeting to be given a sufficient time before the meeting to advise interested parties thereof. Only one publication is required. Appellees suggest this publication might be 1 day before the meeting, and could not possibly advise residents who depended upon mail delivery of the newspaper. There is nothing in the act to prevent it. The constitutionality

of a law is to be tested by what the act authorizes and what may be accomplished by it. See Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738.

It will be observed by reading sections 12-902, 12-903, and 12-905, R. R. S. 1943, and noting the procedure followed in this case which is in conformity with those sections, that the act is tainted with the principal defects in Elliott v. Wille, *supra,* and Summerville v. North Platte Valley Weather Control Dist., *supra.* We believe these cases are decisive of the constitutional issues here involved.

It is to be noted that the act permits the individuals who promote the petition to fix the boundaries of the district without limitation in any way. There is no provision in the act for a determination by a competent tribunal as to whether the creation of the district will promote the public health, convenience, or welfare, and necessity. There is no provision for determining whether owners of property have been arbitrarily or unjustly included within the district or others have been excluded from the district. There is no provision to provide a determination whether the interested parties' property can receive any benefit from the proposed district.

We hold the Rural Cemetery District Act violates Article I, section 3, Constitution of Nebraska, which provides: "No person shall be deprived of life, liberty, or property, without due process of law." It also violates Article I, section 21, Constitution of Nebraska, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It further is in violation of Article III, section 1, Constitution of Nebraska, as an unlawful delegation of legislative functions to private persons.

For the reasons herein set forth, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES F. SAYERS, APPELLEE, V. WILLARD L. WITTE, APPELLANT, IMPLEADED WITH COUNTY OF SAUNDERS, APPELLEE.

107 N. W. 2d 676

Filed February 24, 1961. No. 34842.

1. **Negligence.** The words "slight" and "gross" as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absolute degrees of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of the defendant.
2. **Negligence: Trial.** The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence.

APPEAL from the district court for Saunders County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Marti, O'Gara, Dalton & Sheldon, for appellant.

Kanouff & Brown, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Saunders County by Charles F. Sayers, plaintiff, against Willard L. Witte, defendant, for personal injuries and property damage sustained by the plaintiff by virtue of a collision between the automobiles operated by the respective parties. The defendant, Willard L. Witte, filed a cross-petition for property damage which he alleged he sustained in said accident. The case was tried to a jury, resulting in a verdict finding against the plaintiff and against the defendant on his cross-petition. The plaintiff filed a motion for new trial

which was sustained. The defendant perfected appeal to this court.

For convenience we will refer to the parties as plaintiff and defendant rather than by their names, and at times to the automobiles of the parties as the plaintiff's or defendant's car, as occasion requires.

The plaintiff's amended petition alleged that the accident was proximately caused by the negligence and recklessness of the defendant in the following particulars: In driving his automobile at a rate of speed greater than was reasonable and proper having regard for the traffic, use, and condition of the road; in failing to reduce his speed when approaching the crest of a hill so as to be able to stop within the assured clear distance ahead; in failing to keep a proper lookout; in failing to apply his brakes in time to avoid colliding with the plaintiff's automobile; and in failing to stop or turn his automobile so as to avoid colliding with the automobile of the plaintiff.

The defendant, for his answer and cross-petition, alleged that the collision, injuries, and damages resulting therefrom were proximately caused by the negligent and careless acts of the plaintiff in the following particulars: The plaintiff failed to have and keep his automobile under proper management and control; failed to keep a proper lookout for other automobiles, particularly the automobile of the defendant; failed to yield the right-of-way to the defendant; and failed to bring his automobile to a stop or change, alter, or to divert the course of the same in order to avert striking defendant's automobile when he saw or, in the exercise of ordinary care, should have seen defendant's approaching automobile.

The plaintiff, by answer to the defendant's cross-petition, denied generally the allegations contained therein, and in reply to the defendant's answer denied generally the allegations contained therein.

The defendant assigns as error that the trial court

erred in granting the plaintiff a new trial.

This accident happened about 6 p.m., on February 14, 1958, on a graveled road approximately 1 mile north and three-fourths of a mile east of the junction of State Highway No. 92 and U. S. Highway No. 30-A with State Spur No. 692, in Saunders County. The plaintiff was operating a 1956 Chevrolet automobile and the defendant, at the time of the accident, was operating a 1952 Pontiac automobile.

The plaintiff testified that he was a deputy sheriff of Saunders County; that on February 14, 1958, he was informed there had been an accident; and that he went to the scene of the accident, made an investigation, and started back to his home. He thought he should return to the point of the accident and put out some flares to avoid other accidents in that locale. He approached the Thorsen farm, pulled into the driveway immediately west of the Thorsen home, and stopped. His automobile was clear off of the road. He then looked to the east and to the west where he had an unobstructed view to the top of a hill to the west. He backed from the driveway onto the road, and kept looking until he thought his car was straightened out. He stopped, took the car out of reverse gear, put it into drive gear, and proceeded forward. When his car was straightened out it was on the south side of the road. As he started forward, he had proceeded approximately a couple of car lengths when his car was violently struck in the rear. He was thrown forward against the steering wheel, lost control of the car, and it stopped in the ditch on the north side of the road 25 or 30 feet from the east edge of the driveway. The plaintiff further testified that there was snow on the road, and gravel showed through the snow in places; that the weather was cold; that he had no difficulty in stopping his car and had stopped his car on the hill on his way to the previous accident; that while backing out of the driveway, the window on the driver's side was down;

and that when his car was struck it was on his side of the road, which was the south side.

On cross-examination the plaintiff testified that instead of going into the Thorsen yard and turning around, he backed his car onto the road; that as he backed the car he continued to look to the west, to the top of the hill; that he had an unobstructed view for 400 feet west of the point where the accident happened; that he did not see the defendant's car; that the defendant's car struck his car on the left rear bumper causing his car to slide sideways turning it into a northeasterly direction into the ditch; that he did not hear a horn and had no occasion to operate his horn; and that his car was equipped with snow tires.

The defendant testified that he was on his way home at the time of the accident and was traveling east on the county road running by the Thorsen place. When he came to the top of the hill, the plaintiff's car was parked in the driveway, standing still. As he proceeded down the hill, he saw that the back-up lights on the plaintiff's car were on, and the plaintiff proceeded to back out of the driveway in a southwesterly direction. At the point of the accident, the hill slopes to the east. He first saw the plaintiff's car from approximately the crest of the hill. He estimated that the plaintiff's car was approximately 100 yards from the crest of the hill. This witness further testified that at that time he did nothing, but when he saw the plaintiff's car starting to back onto the road, he blew his horn and continued to do so for some period of time. He applied his brakes which slowed the speed of his car, and continued to apply his brakes. The plaintiff's car proceeded out onto the road until it was approximately on the south side, pointing in a northeasterly direction, then there was the impact of the two cars. His car struck the left rear bumper of the plaintiff's car, and the plaintiff's car came in contact with the approximate center of the front end of the defendant's car. The defendant's car

was not going very fast at the time of the impact, and moved approximately one car length after the impact occurred. The plaintiff's car was pointing in a northeasterly direction when the defendant's car came into contact with it, and the plaintiff's car proceeded across the road into the ditch on the east side of the driveway. The road was elevated with the ditches graded out, and the ditches were 5 feet deep on each side of the road. He went to the plaintiff's car which was in the bottom of and resting against the north side of the ditch. The gravel on the road extended to the edge of the road and the ditches sloped away from the road. There was no substantial shoulder on the road. In addition to applying his brakes, he endeavored to steer his car as far as possible to the south shoulder of the road. The road was slick because it had snowed the day before and the snow had melted somewhat during the afternoon of the day of the accident, and then had frozen again. The road was packed with snow, with a slight glaze on top. The antifreeze drained from the radiator of his car where his car came to rest after the impact, approximately a car length east of the point of impact. The grade at that point was sloping down in an easterly direction. His automobile remained in the same position after the accident. When he went over to the plaintiff's automobile, the plaintiff made a remark to the effect that "it's funny what some people do when they're in a hurry to get back to the accident—to do such a foolish thing—to back out on the road without seeing" an automobile approaching. The plaintiff denied making such a statement.

The defendant stated in a deposition that when he first saw the plaintiff's car, as he came to the top of the hill, it started to come out of the driveway, backing in a southwesterly direction; that the plaintiff's car had just barely started to move out of the driveway; and that the plaintiff's car was moving and not standing still.

The defendant testified on cross-examination that he

first applied his brakes 170 feet from the driveway; and that he blew his horn while he traveled a distance of 50 feet. On further cross-examination this witness testified that he applied his brakes approximately 300 feet from the point of the accident. The defendant did not give an estimate of the speed of his car at the time of the impact.

A witness testified that he had a conversation with the defendant on February 25, 1958, and the defendant told him that he was traveling east on the graveled road at a rate of speed of 45 or 50 miles an hour; and that when he first saw the plaintiff's car the front of it was about even with the north edge of the road where the driveway begins.

A trooper connected with the Nebraska Safety Patrol testified that he investigated the accident; that he received a call about 6 p.m.; that when he arrived at the place where the accident occurred he found two cars which were involved in the accident; and that the defendant's car was on the road and the plaintiff's car was in the ditch. The accident happened on a graveled road. The traveled part of this road was 22 feet in width, and the point where the accident happened was on the downgrade of a hill. There were glass and debris located approximately 10 feet north of the south side of the traveled portion of the road. With relation to the north edge of the traveled portion of the road, the debris was approximately 12 feet south of the north edge. He observed tracks made by the defendant's automobile. These tracks were along the south side of the road and extended about 13 steps from the defendant's automobile or an estimated distance of 32 feet. There was a track made to the west of the plaintiff's car to the point where that car was sitting when this witness arrived at the scene of the accident. This track was 20 feet to the edge of the road, and 22 feet on down into the ditch. The left portion of the defendant's car had been damaged. The left fender was pushed down on the

left wheel. This witness estimated the length of the plaintiff's car to be 16 or 17 feet, and the height approximately 5 feet.

An engineer made a plat of the area in which the accident occurred. Taking a point from the mailbox at approximately the west edge of the driveway in question to the highest point of the hill west would be 428 feet, and for roughly 9 feet it is almost level, then it starts sloping toward the west.

The sheriff of Saunders County testified that he talked to the defendant unofficially, after the accident, about the accident; and that the defendant told him that just as he "popped" over the hill he saw the back-up lights on the plaintiff's car go off.

At the close of the plaintiff's evidence and at the close of all of the evidence, the defendant moved for dismissal of the plaintiff's cause of action or in the alternative for a directed verdict, primarily for the reason that the evidence of the plaintiff established, as a matter of law, that he was guilty of contributory negligence which would bar recovery on his part. These motions were overruled.

The defendant concedes that the definition of gross negligence given by the trial court in instruction No. 6 is erroneous.

Section 25-1151, R. R. S. 1943, provides in part: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, * * *."

The test this provides and requires is not based upon absolute degrees of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or

otherwise, standing alone. The criterion by which the degree of negligence is to be measured is the extent thereof by comparison with the negligence of defendant. The words "slight" and "gross" as employed in this statute are comparative terms and the requirement of them is that the negligence of the parties must be compared one with the other in determining an issue of slight and gross negligence. See Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774. See, also, Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Allen v. Kavanaugh, 160 Neb. 645, 71 N. W. 2d 119.

As stated in Roby v. Auker, *supra*, with reference to the comparative negligence rule: "The statute by the use of the words 'when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison' clearly intended the words 'in comparison' as qualifying both of the clauses immediately preceding. The words 'slight' and 'gross' as used in the statute are comparative terms and the intent of the statute is that the negligence of the parties shall be compared one with the other in determining questions of slight and gross negligence." See, also, Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158.

From the authorities above cited it will be observed that under the comparative negligence statute, section 25-1151, R. R. S. 1943, it is necessary that negligence of the plaintiff be compared with the negligence of the defendant to determine whether the negligence of one is slight or gross in comparison with the other.

"The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

We conclude that the facts in the instant case present

conflicting evidence relating to the questions of negligence and contributory negligence, and are questions for the jury under proper instructions.

According to the plaintiff's testimony, the farmyard at the Thorsen place was covered with snow, except for the driveway. He looked to the east and to the west before backing onto the road, and continued to look to the west until headed almost due east. He testified that no car was in sight during that time. When he started his car forward, as previously shown in the testimony, the rear of his car was struck by the defendant's car. This presented questions for the jury to determine as to whether or not the plaintiff kept a proper lookout, and the degrees of negligence of the respective parties based upon the facts. If the defendant saw the back-up lights of the plaintiff's car go off as he "popped" over the hill, as testified to by the sheriff, or if the defendant, from the top of the hill some 400 feet to the west, saw the plaintiff's car moving as he testified, then there was a question to present to the jury as to whether or not the defendant was negligent in not having his car under proper control.

We conclude that the trial court committed prejudicial error in giving instruction No. 6, as contended for by the plaintiff. We affirm the judgment of the trial court in granting a new trial.

AFFIRMED.

JOHN F. WEBB, APPELLANT, V. CONSUMERS COOPERATIVE ASSOCIATION, A CORPORATION, ET AL., APPELLEES.
107 N. W. 2d 737

Filed February 24, 1961. No. 34871.

Workmen's Compensation. An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within 6 months or to commence his action within 1 year from

the date of the accident when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

Wright & Simmons and *Robert M. Harris,* for appellant.

Lovell & Raymond, for appellees.

Heard before CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is an action to recover benefits under the Workmen's Compensation Act. The trial court denied a recovery and plaintiff has appealed to this court.

Plaintiff filed his petition with the compensation court on April 16, 1959. The case was heard by a single judge of that court and an award entered. A hearing was had before the court sitting en banc and an award entered. An appeal was taken to the district court. The district court held that the findings of the compensation court were not sufficient to sustain an award, and reversed the award and remanded the cause to the compensation court for further proceedings. The plaintiff thereupon appealed to this court.

The evidence shows that plaintiff was employed by Consumers Cooperative Association as a mechanic in July 1950. On December 8, 1956, while engaged in balancing the wheels of a tractor, a tractor weight weighing approximately 300 pounds struck him in his midsection and pinned him against a wall, causing sharp pains in his low back. He continued to work with considerable pain until the week following, when he con-

sulted Dr. T. E. Riddell with reference to it. Dr. Riddell took X-rays and prescribed heat therapy. The injury was diagnosed by Dr. Riddell as a lumbo-sacral sprain with lacerations of ligaments about the lumbo-sacral joint. This treatment was continued for a few weeks, at the end of which time he returned to his employment.

On February 21, 1957, the plaintiff reinjured his back while picking up heavy materials during his employment. He went to Dr. Riddell and was treated at that time. He was placed in a hospital for 2 weeks. While in the hospital he was placed in traction and heat therapy was administered. After his release from the hospital in March 1957 he remained at home for an additional 2 weeks and then returned to his employment. During this period he was paid compensation from March 3 to April 1, 1957. His hospital and medical expenses in the amounts of $227.30 and $361.50 respectively were paid by the defendant insurance company. On September 17, 1957, he again wrenched his back while working under a truck, and was again treated by Dr. Riddell. In August 1958, while replacing a transmission in a truck by the use of a jack, he again injured his back and was again treated by Dr. Riddell. The evidence shows that these injuries were sustained while performing the usual duties of his employment and that they were not accidents within the meaning of the workmen's compensation law.

The evidence shows that plaintiff, following the August 1958 episode, placed himself under the care of Dr. Riddell on September 22, 1958. The latter took X-rays, administered heat therapy, and on October 21, 1958, placed him in traction in a hospital. On October 29, 1958, he was released from the hospital. After the August 1958 incident plaintiff for the first time complained of leg pains. Due to this, Dr. Riddell for the first time concluded that plaintiff was suffering from a herniated disk in the lower back. He thereupon re-

ferred plaintiff to Dr. Charles G. Freed of Denver, Colorado, a specialist in neurological surgery. Dr. Freed took X-rays and made a complete examination of the plaintiff. He was unable to determine with certainty the cause of plaintiff's disability, but believed it to be a herniated disk which he was able to confirm by surgery. On November 11, 1958, Dr. Samuel P. Newman, an orthopedic surgeon of Denver, Colorado, and Dr. Freed operated on plaintiff's back, which operation confirmed their belief that plaintiff was suffering from a herniated disk. Plaintiff was placed in a cast and sent home on November 26, 1958. On his return home he was placed in a hospital by Dr. Riddell, where he remained until January 15, 1959. He remained in the cast until January 15, 1959, after which he was fitted with a back brace. Dr. Freed saw plaintiff in May 1959 and determined that a recovery had taken place except for a partial permanent disability resulting from the fusing of the vertebrae.

The defendants contend that the claim is barred by section 48-137, R. R. S. 1943, in that a claim was not filed with the compensation court within 1 year after the last payment of compensation and expenses. The plaintiff asserts that the permanent nature of the disability was latent and that the statute applies from the time the employee acquired knowledge of the true character of the injury.

It is fundamental that a causal connection must be shown between an accident suffered by the claimant and the cause of his disability. McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30. Whether or not there was a causal connection between the accident of December 8, 1956, and the herniated disk discovered on November 11, 1958, must be determined from the evidence of the medical experts who testified in the case. On this subject Dr. Newman testified: "My opinion is that the initiating cause goes back to December of 1956. The subsequent ones were aggravating contributions." Dr.

Freed testified that in his opinion the injury of December 8, 1956, was such that it could cause the herniated disk and he found nothing else that would account for the condition besides the injury. Dr. Riddell testified that in his opinion the injury in August 1958 was the precipitating cause of the herniated disk, that the accident of December 8, 1956, was when plaintiff first injured his back, and that he had a succession of injuries that might have precipitated the condition of the one in September 1958. The defendants offered no evidence on the subject of causal connection or the want thereof. The foregoing evidence sustains a finding that the accident of December 8, 1956, was the initial cause of the back injury and that subsequent injuries were aggravating contributions to the ultimate development of the herniated disk that led to surgery. It seems clear from the record that the ultimate disability was not known to the employee until November 1958, and that the medical experts did not find or suspect a herniated disk condition prior to October 1958. Under such circumstances the claimant is within the statutory period in filing his claim on April 16, 1959.

The rule as to latent disease or disability is as follows: "An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within six months or to commence his action within one year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability." McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373. See, also, Plambeck v. Natkin & Co., *post* p. 774, 107 N. W. 2d 734, wherein the cases on this subject have been col-

lected. The claimant has established his claim to compensation.

The defendants contend that the finding of the compensation court that plaintiff is entitled to $3.85 per week for 271 6/7 weeks for 7 percent permanent partial disability to plaintiff's body as a whole is not sustained by the evidence. Four doctors gave their opinions as to the percentage of permanent partial disability as follows: Dr. Riddell, 5 percent; Dr. Newman, 7½ percent; Dr. Freed, 7 percent; and Dr. Heinke, 5 to 10 percent. The evidence supports a finding of 7 percent permanent partial disability to plaintiff's body as a whole.

Upon examination of the record de novo we arrive at the same conclusion as did the compensation court in its award under date of October 13, 1959. We adopt the award of that court as the conclusion of this court on the record before us. We reverse the judgment of the district court and remand the cause with directions to render a judgment for the plaintiff in conformity with the award of the compensation court sitting en banc under date of October 13, 1959.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD M. GAUGHEN ET AL., APPELLANTS, V. LEONARD GAUGHEN ET AL., APPELLEES, IMPLEADED WITH ALICE JOAN EMANUEL ET AL., APPELLANTS.
107 N. W. 2d 652

Filed February 24, 1961. No. 34881.

1. **Wills. The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law.**
2. **———. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of the testator must be found within the four corners of the will.**

3. ———. A bequest or devise to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed as modified.*

William G. Line, for appellants.

Edward Asche and *George E. McNally,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action to construe the will of Martin F. Gaughen, deceased.

Martin F. Gaughen was survived by three children, Harold M. Gaughen, Leonard Gaughen, and Marie Mundy. Harold M. Gaughen has two children, Leonard Gaughen has five children, and Marie Mundy has no children.

Harold M. Gaughen and his wife were the plaintiffs in the lower court. Leonard Gaughen, his wife and children, Marie Mundy and her husband, and the children, and the husband of one child, of the plaintiffs were the defendants.

The petition as amended requested a construction of that part of the will which made a devise of 240 acres of farmland in Dodge County, Nebraska. That part of the will, with the description of the property omitted, reads as follows: "I give and devise to my sons Harold Gaughen and Leonard Gaughen and my daughter Marie Mundy or to their spouses Mamie Gaughen, Thelma Gaughen and Leo Mundy, respectively, during their natural lives (description omitted); and in the event any of the spouses Mamie Gaughen, Thelma Gaughen or Leo Mundy should remarry, their life estate in the above described real estate shall cease; and upon the death of said life tenants or the remarriage of my children's spouses, Mamie Gaughen, Thelma Gaughen and

Leo Mundy, I give and devise the remainder of said real estate to the children of my son Leonard and the children of my son Harold, share and share alike and to the children born naturally of my daughter, Marie Mundy, if any, and in the event no children are born naturally to my daughter Marie, then I give and devise their share in said above described real estate to the children of my sons Harold and Leonard, share and share alike." The other provisions contained in the will have been omitted from the opinion because they are of no assistance in the construction of the portion quoted above. The parties do not contend otherwise.

The plaintiffs alleged that the will devised an undivided one-third interest in remainder to the children of Leonard Gaughen, an undivided one-third interest in remainder to the children of Harold M. Gaughen, and an undivided one-third interest in remainder to the natural-born children of Marie Mundy; and that in the event no children were born naturally to Marie Mundy, a one-third interest in remainder was to be distributed to the children of Harold Gaughen and Leonard Gaughen, share and share alike.

Alice Joan Emanuel, who is a daughter of the plaintiffs and is of age, and her husband filed a voluntary appearance in which they admitted the allegations of the petition and joined in its prayer.

Martin F. Gaughen, who is a son of Leonard Gaughen and is of age, filed an answer and cross-petition which alleged that the will was not ambiguous and provided for a per capita distribution of the remainder interest among the grandchildren of the testator. A similar answer and cross-petition was filed by the guardian ad litem for the other four children of Leonard Gaughen who are minors.

The trial court held that the will devised the remainder interest to the children of Leonard Gaughen, Harold Gaughen, and the natural-born children of Marie Mundy, share and share alike, or per capita and not per

stirpes. From that decree Harold M. Gaughen and his wife and children have appealed.

The question presented is whether the remainder interest devised to the grandchildren of the testator is to be distributed per capita or per stirpes.

The following statement from Dumond v. Dumond, 155 Neb. 204, 51 N. W. 2d 374, is applicable here: "In construing a will a court is required to give effect to the true intent of the testator insofar as it can be collected from the whole instrument, if such intent is consistent with applicable rules of law. Bodeman v. Cary, 152 Neb. 506, 41 N. W. 2d 797; Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606. Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739. A patent ambiguity is one which appears upon the face of the instrument. It must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself. The controverted provision of the will in the case here presented is one appearing upon the face of the instrument and is therefore a patent ambiguity."

The testator in this case devised the remainder interest to the children of Leonard Gaughen and the children of Harold Gaughen, share and share alike, and to the natural-born children of Marie Mundy, if any. The general rule is that a devise or bequest to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will.

In Hill v. Bowers, 120 Mass. 135, the court said: "The general rule is that by a bequest to the children of A. and to the children of B., the children take per capita

and not per stirpes, in the absence of words indicating a different intention." See, also, Annotations, 16 A. L. R. 61, 78 A. L. R. 1404, 126 A. L. R. 175, 13 A. L. R. 2d 1054; 57 Am. Jur., Wills, § 1310, p. 867; 96 C. J. S., Wills, § 714, p. 94; Page on Wills (Lifetime Ed.), Vol. 3, § 1081, p. 287; Thompson on Wills (3rd Ed.), § 321, p. 483; Jarman on Wills (7th Ed.), Vol. 3, ch. XLII, part IV, p. 1687.

We find no indication in the will that the testator did not intend a per capita distribution. The use of the words "share and share alike" is an indication that the testator intended a per capita distribution.

In Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349, the court held that a devise to the heirs at law and next of kin of the testator "share and share alike" required a per capita distribution among the beneficiaries designated. The court said: "The testator of the will in question by the phrase 'my heirs at law' designated his residuary beneficiaries and by the words 'share and share alike' he prescribed the manner in which they should take. The language used is appropriate to make the intention manifest. He thereby definitely indicated the quantum of the estate which each of his residuary beneficiaries should have. He did not intend that his 'heirs at law' should have the residue of his estate in the proportions provided by the statute as they would have taken if he had died intestate. That would not have been 'share and share alike.' "

The appellants contend that where a patent ambiguity exists and the will does not otherwise provide, there is a presumption that the testator intended that the distribution should follow the statute of descent. Although we do not consider it to be controlling in this case, we point out that under the statute of descent where the heirs of the deceased are lineal descendants who are all in the same degree of kindred to the deceased, they take equally. § 30-102, R. R. S. 1943.

The appellants also argue that "the children of my son

Leonard and the children of my son Harold" refers to two classes of beneficiaries but that "the children of my sons Harold and Leonard" refers to but one class. We do not agree that there is such a distinction between the words quoted. See Jarman on Wills (7th Ed.), Vol. 3, ch. XLII, part IV, p. 1687.

The appellants further argue that the testator did not intend a per capita distribution because he could have accomplished that result more easily by making the devise to "my natural-born grandchildren, share and share alike." The answer to this argument is that the testator did not want to restrict the class to natural-born grandchildren except in the case of the children of Marie, "if any."

The trial court held that the will devised the remainder interest to the children of Harold Gaughen and Leonard Gaughen and the children born naturally to his daughter, Marie Mundy, share and share alike, or per capita and not per stirpes. This was correct and to that extent the decree should be affirmed.

The decree also recited that the testator intended to have all of his grandchildren, the issue of Harold Gaughen, Leonard Gaughen, and Marie Mundy, share equally per capita as a single class and confirmed the title in the remainder interest in them. The decree should be modified to provide that all of the children of Harold Gaughen and Leonard Gaughen and the issue of Marie Mundy share in the remainder interest as a single class per capita, which class shall be subject to being opened to admit additional children of Harold Gaughen and Leonard Gaughen and issue of Marie Mundy. As so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, EX REL. DENNIS P. HOGAN, JR., APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF OMAHA, IN THE COUNTY OF DOUGLAS, STATE OF NEBRASKA, APPELLANT, IMPLEADED WITH SAM J. HOWELL, TREASURER OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, ALSO KNOWN AS RALSTON SCHOOL DISTRICT, INTERVENER-APPELLEE.

107 N. W. 2d 744

Filed February 24, 1961. No. 34928.

1. **Fines: Penalties.** Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common schools in the respective subdivision wherein it accrues.
2. ———: ———. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county.
3. **Constitutional Law: Statutes.** The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication prohibits.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Wm. Ross King, for appellant.

McGowan & Troia and *Ross & O'Connor,* for appellee School Dist. No. 54.

John C. Burke, for appellee Howell.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

WENKE, J.

This appeal involves an action originally instituted in the district court for Douglas County by School Dis-

trict No. 54 of Douglas County, Nebraska, on the relation of Dennis P. Hogan, Jr., as relator, for itself and all other school districts in Douglas County, Nebraska, against the School District of the City of Omaha and Sam J. Howell, as the duly elected, qualified, and acting treasurer of Douglas County. School District No. 54 of Douglas County, also referred to as the Ralston School District, filed a petition of intervention and Sam J. Howell was also made a party defendant as the ex officio duly qualified and acting treasurer of the city of Omaha.

The purpose of the action, as stated in the prayer of the petition, is: "* * * for an accounting by the defendant, Sam J. Howell, of the money received by him and now on hand from fines and penalties arising under the general laws of the State of Nebraska, which fines and penalties have been received by him from the Municipal Court of the City of Omaha, Douglas County, Nebraska, and for judgment in the favor of the plaintiff against the defendant, Sam J. Howell, for a pro rata share of said moneys and for an accounting by the defendant School District of the City of Omaha, in Douglas County, Nebraska, of all such moneys received from the defendant County Treasurer arising from fines and penalties arising under the general laws of the State of Nebraska, imposed by the Municipal Court of the City of Omaha and for judgment against the defendant School District for their pro-rata share thereof, * * *." However, by stipulation, the relief sought has been limited to: "* * * an accounting and distribution by the County Treasurer, ex officio City Treasurer and Treasurer of the School District of Omaha, of fines and penalties on state complaints filed in the Municipal Court of the City of Omaha, Nebraska, paid to said Treasurer subsequent to the filing of this action." This was on August 26, 1958.

On July 25, 1960, the trial court rendered a decree to the effect: "* * * that all money from fines and penal-

ties, including bond forfeitures, arising under the general laws of the State of Nebraska, received by the Treasurer of Douglas County, Nebraska, ex officio Treasurer of the City of Omaha, Nebraska, from the Municipal Court of the City of Omaha, Douglas County, Nebraska, including both the funds now on hand with said Treasurer, as well as all monies hereafter received by said Treasurer from said source, shall be distributed among all of the SCHOOL DISTRICTS OF DOUGLAS COUNTY, NEBRASKA on a pro rata basis according to the enumeration of pupils last returned by the Secretaries of said respective Districts, and as by law provided." The law therein referred to as providing the basis for the distribution ordered is section 79-1304, R. R. S. 1943.

The School District of Omaha thereupon filed a motion for new trial and took this appeal from the overruling thereof.

The primary question presented by this appeal is, should all money collected by the municipal court of the city of Omaha, as a result of the imposition of fines and penalties imposed in prosecutions brought therein for violation of the general laws of the state, be ultimately distributed among all of the school districts of Douglas County or should it be distributed only to the school districts in the city of Omaha?

The facts involved are not in dispute. They are either admitted by the parties' pleadings or agreed to by stipulation. Dennis P. Hogan, Jr., was, at all times herein material, a resident and taxpayer of School District No. 54 of Douglas County; that he had, before bringing this suit, made demand on School District No. 54 to do so; and that said district had failed to take any action for that purpose. It is also stipulated that in the past the School District of the City of Omaha has received all money arising from the source herein claimed, that is, prior to the institution of this action all fines, penalties, and forfeitures collected by the municipal court of the city of Omaha for offenses against the laws of the

state prosecuted therein, which offenses had been committed within the city of Omaha, have been paid to the treasurer of the city of Omaha and by him credited to the School District of the City of Omaha.

Article VII, section 5, of the Nebraska Constitution, insofar as it is material to the question presented, provides as follows: "All fines, penalties, and license money, arising under the general laws of the state, * * * shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, * * *." This is the same language, for all practical purposes, as contained in the Nebraska Constitution of 1875. See Art. VIII, § 5, thereof.

In State ex rel. Helmer v. McConnel, 8 Neb. 28, wherein the construction of Article VIII, section 5, of the Nebraska Constitution of 1875 was involved, the court said, in discussing said section, that: "In distinguishing the 'fines, penalties, and license moneys arising under the general laws of the state,' from those 'arising under the rules, by-laws, or ordinances, of cities, villages,' etc., it is evident to us that reference was had, not to the primary source of the power, but to the immediate authority by which the fine or penalty is imposed, or the license granted." See, also, Hrabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358.

In State ex rel. Helmer v. McConnel, *supra,* this court held to the effect that where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the com-

mon schools in the respective subdivision where it accrues. See, also, School District of Omaha v. Gass, 131 Neb. 312, 267 N. W. 528.

In State ex rel. School Dist. of Omaha v. Heins, 14 Neb. 477, 16 N. W. 767, this court held: "It is the true intent and meaning of the first clause of sec. 5 of art. VIII (now sec. 5 of art. VII) of the constitution of the state, that all fines, penalties, and license money arising under the general laws of the state shall be paid over to the counties respectively where the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county." See, also, School District of Omaha v. Gass, *supra.*

We think the foregoing constructions of this constitutional provision are correct and are here controlling. It will be observed that the Constitution does not impose any condition on this right by making it depend upon where the violation occurred, by whom it is prosecuted, or in what court it is prosecuted.

But appellant contends the Legislature gave it the right thereto when it enacted what is now section 14-227, R. R. S. 1943. It provides, insofar as here material, that: "All fines, penalties, and forfeitures collected for offenses against the ordinances of the city, or for misdemeanors against the laws of the state, committed within the city, *shall, unless otherwise provided by law,* be paid by the person receiving the same to the city treasurer." (Emphasis ours.)

The Legislature can not enact a valid law which conflicts with the Constitution. This court, as early as the case of City of Hastings v. Thorne, 8 Neb. 160, said: "That body (the Legislature) can legalize no act which they could not have authorized before it was done. In other words, they cannot validate that which the constitution either in express terms or by necessary implication prohibits."

We do not believe the Legislature attempted to vio-

late the foregoing principle for by the terms of section 14-227, R. R. S. 1943, it provides the provisions thereof shall not be applicable to situations where the law provides otherwise. As we have often said, the validity of a statute is favored and when susceptible of two constructions the one holding such statute valid will ordinarily be followed. See, Starman v. Shirley, 162 Neb. 613, 76 N. W. 2d 749; Metropolitan Utilities Dist. v. City of Omaha, *ante* p. 609, 107 N. W. 2d 397. Here the exception can properly be held to refer to both the law of the Constitution applicable thereto, which we have hereinbefore discussed, and statutes so providing. See §§ 26-118, 29-2702, and 29-2708, R. R. S. 1943. The latter clearly recognize the constitutional requirements.

Other questions are raised and discussed by appellant but they are either controlled by what we have held or have no application to the question involved. We think the holding of the trial court is correct. We, therefore, affirm the judgment which it rendered.

AFFIRMED.

HARRY PLAMBECK, APPELLANT, V. NATKIN & COMPANY, APPELLEE.
107 N. W. 2d 734

Filed February 24, 1961. No. 34940.

1. **Workmen's Compensation.** The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
2. ———. An employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure to give notice of claim within 6 months or to commence his action within 1 year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, provided notice is given and action commenced

within the statutory period after the employee has knowledge that the accident has caused a compensable disability.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

Tesar & Tesar, for appellant.

Gaines, Spittler, Neely, Otis & Moore, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is a case arising under the Workmen's Compensation Act. It was heard by one of the judges of the court who dismissed the cause. It was again heard before the court sitting en banc. It was again dismissed. It was taken under statutory procedure to the district court where the plaintiff's petition was again dismissed.

Plaintiff appeals here. We reverse the judgment of the trial court and remand the cause with directions.

The appeal presents primarily the question of whether or not the cause is barred by the 1-year limitation provision of section 48-137, R. R. S. 1943.

The matter comes up under the procedure which requires trial de novo here.

Plaintiff was 42 years of age at the time of the accident, was a steamfitter, and had been doing the heavy work of that trade for 20 years. He had been steadily employed by defendant as a steamfitter for 4 years. On May 15, 1957, while so employed, and when lifting a heavy pipe he slipped and strained his back. His fellow employees and his foreman were notified. He made out a written report of the accident. On May 22, 1957, he consulted his doctor and was directed to undergo home therapeutic treatments. He returned to the doctor on July 8, 1957, when his back was X-rayed. He was sent to another doctor. The diagnosis was that of a spondylolisthesis, or a slipping of the vertebra of his

back. The spondylolisthesis was "in all probability * * * a congenital deformity." A back of that nature is more prone to cause symptomatology should there be an unusual strain thrown upon it.

The doctor to whom plaintiff was referred prescribed a supporting belt. Plaintiff bought it, and defendant paid for it and also paid the two doctors' bills. No other payments were made to plaintiff. Defendant's contention here is that the 1-year limitation period began to operate when it made the last of the three payments for medical treatments above referred to. They were paid more than a year before the plaintiff filed his petition in the compensation court.

No question is presented as to the injury nor that it did not arise out of and in the course of employment. Likewise there is no claim of lack of notice or lack of claim for compensation within the statutory time.

Plaintiff's wages were $3.30 an hour for a 40-hour week, with occasional overtime. Plaintiff worked at all times from the date of his accident to April 20, 1958. He wore the brace furnished by defendant. He was given light work by defendant, and his fellow employees assisted him. In April 1958 he became unable to work as the result of an "exacerbation of an inflammatory process that afflicted both lower extremities." This was the return of a preexisting condition. It was relieved so that he returned to work in July 1958. He worked until September 14, 1958. His disability that then caused him to quit work is described as a rash and thrombophlebitis with stasis ulcers. He was required to sit during the day with feet elevated during the period of treatment and recovery. That situation appears to have cleared up in December 1958 but, as a result of his position and treatment, his back condition became worse and he became totally disabled for the hard work of his trade. The only medical evidence is that his condition is the result of the accident of May 15, 1957. On December 15, 1958, he went to the defendant and asked

for therapeutic treatment which had been recommended before surgery was undertaken. The defendant refused to furnish treatment because of a claim that it was no longer liable.

The petition for compensation was filed February 3, 1959.

Since March 1959 plaintiff has been employed, doing light work consisting of answering telephone calls, etc., in an office.

In summary, this record shows without substantial dispute that plaintiff suffered an accident on May 15, 1957; the examining physician reported it to defendant as a nondisabling injury; defendant furnished the only care required, to wit, the back brace; plaintiff continued to work until April 1958 and was paid full wages therefor; and he was off work because of a preexisting physical condition not connected with his employment from sometime in April to July 1958, when he again resumed work at full time and full pay until September 1958, when he was again off work because of a preexisting condition not connected with his employment. Defendant was advised of plaintiff's total disability on December 15, 1958, and that it was a result of the injury of May 1957.

Defendant offered no evidence challenging the correctness of this statement of facts.

We have decided the questions presented by this record.

A long-established rule is: "The applicable rule of construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation." Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

In Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449, we held that an employee, sustaining an accidental injury arising out of and in the course of his employment, will not be denied compensation for failure

to give notice of claim within 6 months or to commence his action within 1 year from the date of the accident, when it appears from the evidence that the injury was latent and did not result in compensable disability until after the expiration of the time for giving notice of claim and commencing action, *provided notice is given and action commenced within the statutory period after the employee has knowledge that the accident has caused a compensable disability.*

This rule threads throughout our decisions. A study of the decisions show that they turn on the question of knowledge of a compensable disability. The rule may well have had its inception in Johansen v. Union Stock Yards Co., 99 Neb. 328, 156 N. W. 511. See, in sequence, Selders v. Cornhusker Oil Co., 111 Neb. 300, 196 N. W. 316; McGuire v. Phelan-Shirley Co., 111 Neb. 609, 197 N. W. 615; City of Hastings v. Saunders, 114 Neb. 475, 208 N. W. 122; Astuto v. V. Ray Gould Co., 123 Neb. 138, 242 N. W. 375; Collins v. Casualty Reciprocal Exchange, 123 Neb. 227, 242 N. W. 457; Marler v. Grainger Bros., 123 Neb. 517, 243 N. W. 622; Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925 (a case with marked fact similarities to the one here determined); Clary v. R. S. Proudfit Co., 124 Neb. 582, 247 N. W. 417. In Park v. School District No. 27, 127 Neb. 767, 257 N. W. 219, there was an application of this rule, where compensation was denied, because plaintiff showed an injury "if compensable at all" from the date of the accident. Here there is no claim of a compensable injury until December 15, 1958, other than the one for which compensation was furnished by supplying the brace and in the payment of the doctors' bills. The question is again discussed and the rule stated in Dunlap v. City of Omaha, 131 Neb. 632, 269 N. W. 422, where an injured person with knowledge that he was entitled to compensation failed to seek it during the statutory period.

Scott v. State, 137 Neb. 348, 289 N. W. 367, disposes of the question, if there be one here, of whether or not

the injury here involved is to be considered as "latent" under the rule. There the defendant had paid compensation. There was an application for increased compensation. Defendant contended that proceedings for compensation for the increased disability could not be brought except 1 year from the date of the last compensation payment. We held: "Equitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury * * *." See, also, Lind v. Nebraska National Guard, 144 Neb. 122, 12 N. W. 2d 652, 150 A. L. R. 1449; Surratt v. Otoe Food Products Co., 146 Neb. 854, 21 N. W. 2d 862; Keenan v. Consumers Public Power Dist., 152 Neb. 54, 40 N. W. 2d 261; Hauff v. Kimball, 163 Neb. 55, 77 N. W. 2d 683.

We have here undertaken to answer the questions that are presented by this appeal. We find that the trial court erred in holding that this cause was barred by the statute of limitations. We find that it was not so barred. We find also that there is ample and in fact uncontradicted evidence that the plaintiff at the time of the hearing was totally and temporarily disabled, and that the disability began on December 15, 1958. There is not sufficient evidence upon which a finding of permanent total disability may be made. It is conceded that plaintiff suffered an injury on May 15, 1957, and that such injury arose out of and in the course of his employment. We find that the evidence shows without dispute that plaintiff's temporary total disability is the result of the injury of May 15, 1957. The amount of plaintiff's wages is as recited herein and is not in dispute.

The judgment of the district court is accordingly reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWIN HUGHES, APPELLANT, V. BLANCHE DE BARBERI ET AL., APPELLEES.
107 N. W. 2d 747

Filed March 3, 1961. No. 34812.

1. **Husband and Wife: Descent and Distribution.** The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by section 30-105, R. R. S. 1943.
2. ———: ———. Such an estate of inheritance can be voluntarily divested only by a conveyance executed by such husband and wife while residents of this state.
3. **Joint Tenancy: Tenancy in Common.** A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common.
4. **Vendor and Purchaser: Husband and Wife.** A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the conveyance by the wife without the husband joining in the deed.
5. **Husband and Wife: Specific Performance.** In such a case the court may decree specific performance of the agreement against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree.
6. ———: ———. Where the purchaser fails in such a case to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Hugh J. Boyle and *Bernard E. Vinardi,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit for the specific performance of a written

contract for the purchase by plaintiff from defendants of a residence property for the sum of $21,000, and for the abatement of the purchase price to compensate plaintiff for failure to furnish a permanent easement across adjoining property as provided by the contract of sale. The trial court found for the defendants and plaintiff appeals.

The evidence shows that Lee Waller and Blanche de Barberi were the owners of the record title as joint tenants. On October 9, 1958, the plaintiff Hughes executed a purchase agreement by which he offered to pay $21,000 for the property. The purchase agreement was submitted to Lee Waller and Blanche de Barberi, who accepted the offer and signed the purchase agreement. Blanche de Barberi signed the name of her husband, Louis de Barberi, to the purchase agreement. It is the contention of the defendants that the failure of Louis de Barberi to sign the purchase agreement will not authorize a decree of specific performance as to him and therefore should not be granted against the other defendants. In disposing of this question we shall assume that the purchase agreement is in all respects a valid and binding contract of sale.

Section 30-105, R. R. S. 1943, so far as applicable here, provides: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, * * *." It seems clear that under this provision if the husband, Louis de Barberi, was seized of an estate of inheritance in the property described in the purchase agreement, he could not be divested of such interest by a conveyance of the property by the wife in which he did not join. The determining factor is whether or not Louis de Barberi was possessed of an estate of inheritance in the property which his wife held in joint tenancy with her mother, Lee Waller.

We point out that Lee Waller is a widow. Blanche de Barberi is the daughter of Lee Waller and the wife of Louis de Barberi. All are residents of Nebraska. The defendants de Barberi claim no homestead rights in the property. While it might be argued that during the existence of the joint tenancy an estate of inheritance by the husband in the joint tenancy was purely speculative in that it is conditional on Blanche de Barberi acquiring a fee title as the survivor, a question we do not here decide, yet we are of the opinion that Louis de Barberi had an estate of inheritance in the property because of the destruction of the joint tenancy by the execution of the purchase agreement by the joint tenants. This question was considered in Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252. We there came to the conclusion that an agreement to sell joint property executed by all the joint tenants destroys the joint tenancy. We necessarily conclude that the execution of the contract of sale in the instant case had the effect of destroying the joint tenancy, and it necessarily follows that Louis de Barberi became possessed of an estate of inheritance in the wife's interest in the property as a tenant in common, which would come to him upon her death during his lifetime.

The contract of purchase in the case before us is not void. It has the effect of a contract for the sale of the interests of the joint tenants. The husband not having signed the purchase agreement has not divested himself of his estate of inheritance.

In Zvacek v. Posvar, 118 Neb. 163, 223 N. W. 792, the court in its headnotes stated the rule as follows: "A party to a written contract for the sale of his real estate, not a homestead, will not be excused from performance because the wife did not sign the agreement and refused to join in the deed, if the other party is willing to accept conveyance by the vendor without the wife joining in the deed. * * * In such case, the court may decree specific performance of the agreement

against the vendor alone, if the other party consents thereto; the wife's marital rights in such real estate not being affected by such decree." See, also, Davis v. Merson, 103 Neb. 397, 172 N. W. 50; Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732, 41 Am. R. 767; Lutjeharms v. Smith, 76 Neb. 260, 107 N. W. 256.

The plaintiff in the instant case seeks specific performance against the joint tenants, Lee Waller and Blanche de Barberi, and the nonsigning husband of Blanche de Barberi. Since the husband did not sign the purchase agreement, specific performance may not be decreed against him. Plaintiff has not indicated by pleading or evidence that he was willing to accept a deed from the joint tenants alone, and consequently subject to the rights of the husband, Louis de Barberi, in the property. Under such circumstances a court of equity will not order a partial specific performance.

The plaintiff contends that Louis de Barberi is estopped from disputing the validity of the purchase agreement under the doctrine announced in Haugh v. Lanz, 187 Iowa 841, 172 N. W. 199; Trepel v. Sendrovitz, 119 N. Y. S. 2d 374; and Harper v. Albright, 228 Ark. 760, 310 S. W. 2d 475. Even if the rule of these cases is the law of this state, the evidence is wholly insufficient to bring this case within the scope of the rule therein announced.

Other matters assigned as error in the appeal are not discussed in view of our holding that specific performance of the purchase agreement was properly denied for the reason stated.

The decree of the district court denying plaintiff's prayer for specific performance of the purchase agreement is affirmed.

AFFIRMED.

ELLWOOD B. CHAPPELL and PAUL E. BOSLAUGH, JJ., not participating.

IN RE APPLICATION OF HAROLD E. YOUNG.
HAROLD E. YOUNG, DOING BUSINESS AS YOUNG'S SERVICE, APPELLEE, V. MORGAN DRIVE AWAY, INC., ET AL., APPELLANTS, IMPLEADED WITH MARJORIE J. SPIDELL, APPELLEE.
107 N. W. 2d 752

Filed March 3, 1961. No. 34823.

1. **Public Service Commissions.** An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest.
2. **Public Service Commissions: Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.
3. ———: ———. The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices.
4. ———: ———. The primary object of the regulation of public utilities by the Nebraska State Railway Commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public.
5. ———: ———. Our holding in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, modified to the extent and in the manner set forth in our opinion.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Story, Pilcher, Howard & Hickman and *Nelson, Harding & Acklie,* for appellants.

Theodore L. Richling, for appellee Young.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

WENKE, J.

On May 28, 1959, Harold E. Young, doing business at 2663 St. Marys Avenue in Omaha, Nebraska, under the name of Young's Service, filed an application with the Nebraska State Railway Commission seeking to obtain authority to operate as a motor carrier for hire in intrastate commerce upon the highways of Nebraska in the moving of house trailers and mobile homes over irregular routes throughout the state, such hauling to originate or terminate in Omaha or within a radius of 250 miles thereof.

Protests to the granting of this authority were filed with the commission by Marjorie J. Spidell of Omaha, Nebraska; Cecil R. Schelby, doing business as Mike's Trailer Sales of Lincoln, Nebraska; National Trailer Convoy, Inc., of Tulsa, Oklahoma; and Morgan Drive Away, Inc., of Elkhart, Indiana. Each of these protestants either had, or had made application for, authority to operate in the same field applied for by Young.

A hearing was had on the application before an examiner appointed by the commission for that purpose. The examiner filed a report with the commission on October 13, 1959, recommending that the application be granted. Exceptions were filed thereto by each of the protestants. These the commission overruled, finding: "2. That applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of Sections 75-222 to 75-250, R. R. S. 1943, as amended, and the requirements, rules and regulations of the Commission thereunder.

"3. That the proposed service is or will be required by the present or future public convenience and necessity to the following extent:

SERVICE AUTHORIZED:

House trailers and mobile homes.

ROUTE OR TERRITORY AUTHORIZED:

Between points and places within a 250 mile radius of Omaha, and between points and places within said

radial area on the one hand, and on the other hand, all points and places in Nebraska, over irregular routes.

"4. That a certificate of public convenience and necessity should be issued to Harold E. Young, dba Young's Service, Omaha, Nebraska in Application No. M-11068, authorizing operations as described in paragraph No. 3 above." It therefore ordered "* * * that a certificate of public convenience and necessity be, and the same is hereby, issued to Harold E. Young, dba Young's Service, Omaha, Nebraska in Application No. M-11068, authorizing operations as described in paragraph No. 3 of the findings above, * * *."

Motions for rehearing were filed by Morgan Drive Away, Inc., and National Trailer Convoy, Inc. These motions for rehearing were overruled by the commission and thereafter Morgan Drive Away, Inc., National Trailer Convoy, Inc., and Cecil R. Schelby took this appeal therefrom.

Appellants contend the order of the commission is devoid of requisite basic findings of fact and is therefore unlawful and void. We have already set forth the commission's findings. They respond generally to the requirements of section 75-230, R. R. S. 1943, which provides, insofar as here material, that: "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250, and the requirements, rules and regulations of the State Railway Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; * * *."

In Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915, wherein the commission's findings were also substantially in the language of the

statute, the same issue was raised. We therein stated we could find no statute that places such a requirement on the commission and, in the absence thereof, declined to place such a requirement on it, holding: "An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest." While in Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715, and Oakdale Tel. Co. v. Wilgocki, *ante* p. 425, 106 N. W. 2d 486, we have been critical of the commission's conduct in connection with its handling of the matter before it in these cases, however, neither of these cases either overrules or modifies our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra.*

But appellants call our attention to section 84-915, R. S. Supp., 1959, which was enacted by the Legislature subsequent to our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra.* That section, insofar as here material, provides: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record *and shall be accompanied by findings of fact* and conclusions of law. *The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact.*" (Emphasis ours.) It will be observed the language quoted, particularly that emphasized, authorizes the commission to do exactly what it did and is not contrary to our holding in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra.* We find appellants' contention in this regard to be without merit.

"The burden is on the applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules,

and regulations of the commission promulgated thereunder; and that the proposed service is or will be required by the present or future public convenience and necessity." Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

In view of appellee having this burden it is appellants' contention that appellee has not adduced sufficient evidence to meet the standards this court has set up where new or extended original authority is being sought. The rule referred to is as follows: " 'In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.' " Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra*. We have applied this rule to situations wherein authority was being sought to operate a regular bus line within a city, to operate a regular bus line between cities, to operate regular freight lines, and to operate irregular freight operations. See, Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296; In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603; In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507; Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496; Christensen v. Highway Motor Freight, 158 Neb. 601, 64 N. W. 2d 99; Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386; Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310; Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265; Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra*.

Under this principle we have said: "The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and

necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier." In re Application of Canada, *supra.* See, also, Schmunk v. West Nebraska Express, *supra;* Houk v. Peake, *supra.*

Applying this evidentiary conclusion to applications for irregular route authority on a statewide basis would mean, once a certificate of public convenience and necessity had been issued granting such authority to a holder capable of and willing to satisfactorily serve the entire state, he would have an absolute right thereto and the commission would be without authority to grant such authority to any other applicant. We do not think that was the intent and purpose of the Motor Carrier Act.

The commission is purely a regulatory body. In re Application of Moritz, *supra.*

"The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation 'in the public interest,' and to promote 'efficient service' without 'undue preferences or advantages, and unfair or destructive competitive practices.' The declared policy does not condemn competition. It does condemn 'unfair or destructive competitive practices.'" Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra.* See, also, Edgar v. Wheeler Transport Service, Inc., *supra.*

"The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but, first and at all times, to serve the interests of the public." Furstenberg v. Omaha & C. B. St. Ry. Co., *supra.* See, also, Houk v. Peake, *supra;* Christensen v. Highway Motor Freight, *supra;* In re Application of Moritz, *supra;* Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

While the conclusion reached in In re Application of

Canada, *supra,* hereinbefore quoted, would apply rather strictly to cases involving applications for authority to operate buses within a city or in regular route service between cities and generally to regular route freight lines, it would, however, have very limited application to applications seeking authority to operate irregular route authority. We think our holding in In re Application of Canada, *supra,* should be so modified.

"The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity and such proceedings are administrative and legislative in character." Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.*

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra.* As stated in Ferguson Trucking Co., Inc. v. Rogers Truck Line, *supra:* " 'This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.' "

The evidence shows that appellee, within the past 12 years, has developed a substantial towing business in the city of Omaha and the immediately surrounding territory, having adequate personnel and equipment for that purpose. The record fully supports the commission's finding No. 2, and appellants make no contention to the contrary. They do, however, contend that it does

not support the commission's finding No. 3.

The record shows that the commission had not taken over the regulation of this type of operations on the state's highways until very recently. Protestant Morgan Drive Away, Inc., which operates in this field on a national basis with some 650 to 700 units, had obtained statewide authority of this character in 1955; protestant Cecil R. Schelby, doing business as Mike's Trailer Service, had been given the same statewide authority sometime shortly thereafter; protestant Marjorie J. Spidell, operating as Nebraska Trailer Service, was given statewide authority on August 17, 1959, just shortly before the examiner held his hearing herein on September 14, 1959; and protestant National Trailer Convoy, Inc., which operates in this field on a national basis with some 700 units, had made application for such authority on which a hearing had been held on September 3 and 4, 1959, but which had not been acted on at the time of the examiner's hearing herein. It thus becomes evident that at least two of the protestants, at or about the time appellee was seeking the authority which the commission granted him, felt there was a public need in this field for additional services. We think the evidence shows there was and that the authority herein granted appellee will serve a useful purpose in helping supply that need.

The record shows the trailer or mobile home business is expanding; that factories manufacturing such products have come into Nebraska; that the number of trailer courts or parks are increasing; and that the existing trailer courts or parks are increasing in size. All of this has and will lead to increased business in the field of moving these trailers or mobile homes on the highways of the state. There do not appear to be too many motor carriers in this field having intrastate authority. Considering the evidence as a whole, in relation to the standards applicable to the application here being considered, we cannot say the commission acted

either unreasonably or arbitrarily in granting the authority it did to appellee. We therefore affirm its action doing so.

AFFIRMED.

JOHN SCHROEDER ET AL., APPELLANTS, V. HOMESTEAD CORPORATION, APPELLANT, IMPLEADED WITH MARGARET A. WILLIAMS ET AL., APPELLEES, WILLIAM W. FREELAND, INTERVENER-APPELLEE.
107 N. W. 2d 750

Filed March 3, 1961. No. 34870.

Appeal and Error. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

APPEAL from the district court for Washington County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Roy M. Harrop and *George Evens,* for appellants.

Roy I. Anderson and *O'Hanlon & O'Hanlon,* for appellees.

John S. Barrett, for intervener-appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is an appeal from the district court for Washington County.

The notice of appeal recites that it is from decrees rendered on August 31, 1959, January 4, 1960, and April 12, 1960, and from the overruling of a motion to vacate the judgment and decree or in the alternative the overruling of a motion for a new trial. We do not find a decree of August 31, 1959, in the transcript. We

do find a decree of January 4, 1960. However, this decree is shown to have been set aside by "consent of the parties" and another decree rendered April 12, 1960. It is from that decree and subsequent proceedings that the appeal is evidently taken.

The action seems to have been brought by one John Schroeder as plaintiff against Homestead Corporation, two named parties, and all persons claiming any right, title, or interest in certain described real estate "all in Harrison County, Iowa." The petition refers to one Roy M. Harrop as "co-owner," and Harrop verifies as attorney for the plaintiff. Later Harrop is carried as a plaintiff with Schroeder in the title of pleadings. The "Homestead Corporation" is carried as a defendant throughout, although in its answer referred to later herein is the recital that it is "Now American Cooperative Company, A Corporation."

We are assured in appellant's brief that this is the second appearance of this case in this court. Reference is made to Schroeder v. Homestead Corporation, 163 Neb. 43, 77 N. W. 2d 678. However we find nothing in the record before us to connect that appeal and the instant one save the similarity of names and some facts and contentions of the parties.

Schroeder, Harrop, and Homestead Corporation are recited as appellants.

On November 10, 1960, on motion of appellees the purported bill of exceptions herein was stricken by this court. That order became final.

We here must examine the record, then, under the long-recognized rule that: In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253.

We go then to the pleadings insofar as they relate to the decree rendered herein.

The petition was filed under the Uniform Enforcement of Foreign Judgments Act, sections 25-1587 to 25-15,104, R. R. S. 1943. The petition pleaded the existence of a judgment rendered in the district court for Harrison County, Iowa, and prayed that the judgment be registered in Washington County, Nebraska. An authenticated copy of the Iowa judgment was attached to the petition. It involved a large tract of land along the Missouri River.

Later there was filed by Schroeder and Harrop as "plaintiffs" a praecipe and application for writ of scire facias for execution on the registered judgment and decree.

A notice to show cause was issued and served on several persons. Issues were made up on that notice by parties claiming to own parts of the land in severalty.

The parties so noticed answered and denied generally; several of them, with spouses, alleged ownership of the land involved by record title and adverse possession; they alleged that the land involved in the litigation had all accreted to their land throughout the years and had been in existence for more than 20 years; and some of them alleged actions to quiet title and res judicata. They further alleged that the land involved in fact existed in Washington County, Nebraska, and not in Iowa during all of the time plaintiffs were undertaking to obtain possession in Iowa and that plaintiff's "foreign judgment" was void because of nonjurisdiction of the courts of Iowa over the subject matter of the action. They further alleged that the action was barred by the statute of limitations contained in Laws 1943, c. 130, § 4, p. 436, Vol. 2 A, R. R. S. 1943, appendix, page 663. Schroeder, Harrop, and Homestead Corporation replied denying generally and asserted several affirmative defenses to the allegations of the answer.

The trial court in its decree of April 12, 1960, re-

cited that the trial proceeded for 8 separate days until "all the evidence had been presented by all of the parties"; and that the court in company with counsel had viewed the premises. It found generally against Schroeder, Harrop, and Homestead Corporation and in favor of the appellees claiming ownership. It made several specific findings of fact in accord with its general findings.

It then decreed that the purported judgment of the district court for Harrison County, Iowa, was void. It denied registration of the judgment and the application for the writ of scire facias.

By specific reference, to parties appellees' specific lands, it held that the land was owned by the parties in fee simple, free and clear of any right, title, claim or demand of Schroeder, Harrop, and the named corporation. It cancelled any instruments of record concerning the title to the land and any rights of Schroeder, Harrop, or the corporation therein, and barred them from asserting any claim of right to possession or ownership of lands described in the decree.

Under the rule of law above announced, the judgment of the trial court is affirmed.

AFFIRMED.

JEANNE M. SCULLEY, APPELLANT, V. LARRY T. SULLIVAN, SR., ET AL., APPELLEES.
108 N. W. 2d 82

Filed March 3, 1961. No. 34872.

Insurance. Under the statutes which were effective and controlling in this case, in order to effect the cancellation of a policy of insurance by the insurer, it was necessary that there be a tender back to the insured of the paid but unearned premium.

APPEAL from the district court for Dawson County: JOHN H. KUNS, JUDGE. *Reversed and remanded with directions.*

William S. Padley, for appellant.

Cook & Cook, for appellee Motor Vehicle Cas. Co.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is a proceeding in garnishment in an action by Jeanne M. Sculley, plaintiff and appellant herein, against Larry T. Sullivan, Sr., and Larry T. Sullivan, Jr., defendants, to recover damages for personal injuries and damages to property by the plaintiff from the defendants. That action resulted in a judgment in favor of the plaintiff for $1,804.16 and costs in the amount of $23.55. The action for damages grew out of a collision between an automobile operated by Larry T. Sullivan, Jr., and one operated by the plaintiff on December 15, 1953. The automobile operated by Larry T. Sullivan, Jr. was owned by Larry T. Sullivan, Sr., who had obtained liability insurance which covered liability for operation by Larry T. Sullivan, Jr., in the amount of $5,000 for bodily injury to one person and $5,000 for property damage. The designated policy period was from September 19, 1953, to September 19, 1954. The premium, which was paid, was $29.70. The insurance was procured from Motor Vehicle Casualty Company, an insurance corporation, garnishee and appellee here. The insurance was procured by and through the agency of Bernard A. Norsworthy of Gothenburg, Nebraska, who was carrying on his business in the name of Norsworthy Agency. The premium on the insurance was paid to Norsworthy.

A notice of cancellation of the policy of insurance, apparently originating at Elmhurst, Illinois, bearing the date of October 29, 1953, was sent by mail to Larry Sullivan. The declared effective date of cancellation was November 6, 1953. The notice bears no signature but from type which is a part of the notice it appears to have been sent out by a general agency of the insurance

company located at Fremont, Nebraska, at the request of the company. The notice stated that there was a return premium of $29.70. This was, as is clear, due Larry T. Sullivan, Sr., upon cancellation. No return of premium however accompanied the notice. A copy of this notice, as he believes, was sent to Norsworthy. The record discloses, and about this there is no controversy, that neither the company nor Norsworthy ever refunded the premium.

Norsworthy was promptly notified of the accident which resulted in the judgment in favor of plaintiff and against the defendants. The insurance company did not defend the action. After the judgment was rendered some portion of the amount thereof was paid by Larry T. Sullivan, Sr. The amount or extent of such payment is not disclosed by the record here.

Following the part payment of the judgment the plaintiff in appropriate manner instituted garnishment proceedings in that action to recover from the insurance company, which will be hereinafter referred to as the appellee, the balance of the judgment with interest and costs.

The garnishment proceeding is predicated on a contention that the policy of insurance issued by the appellee to Larry T. Sullivan, Sr., was in full force and effect at the time of the accident which was the basis of the judgment, and that notwithstanding the notice it had not been effectually canceled, and thus the appellee was liable for the payment of the judgment.

There is no dispute here about the question of whether or not the appellee is liable if the policy of insurance was in force and effect. The appellee effectually concedes that it is liable if the policy was in force and effect.

The only question for determination is that of whether or not the policy of insurance was canceled by the notice which has been described, or by the notice coupled with the acts of the parties and of Norsworthy, who

acted as agent for the appellee at the time of the issuance of the policy.

The parties are in accord that the following from section 44-379, R. R. S. 1943 (Reissue of 1952), was in full force and effect at all times of concern in this case and that under it, in order to effect the cancellation of a policy of insurance by the insurer, it was necessary that there be a tender back to the insured of the paid unearned premium: "Any company or association also reserves the right to cancel any policy or any part thereof by tendering to the assured the paid unearned premium." See, also, German Ins. Co. v. Rounds, 35 Neb. 752, 53 N. W. 660; Petersen v. Ohio Casualty Ins. Co., 131 Neb. 128, 267 N. W. 393; Schnell v. United Hail Ins. Co., 145 Neb. 768, 18 N. W. 2d 112.

The record discloses that Norsworthy received the premium for and on behalf of the appellee. There is no evidence that it ever returned or directed the return of the unearned premium.

The substantial theory of the appellee however is that the premium must be treated as having been in the hands of Norsworthy and held by him as agent for Larry T. Sullivan, Sr., with his knowledge and consent for the purpose of applying it in payment of other insurance, because of conduct of Larry T. Sullivan, Sr., and Norsworthy after notice of cancellation had been received, coupled with a suggestion, not in anywise supported by competent evidence, that although the premium had been received by Norsworthy it had not been paid or accounted for to the appellee. No witness testified that the premium had not been accounted for by Norsworthy to the appellee.

The only testimony bearing on the question of whether or not Norsworthy had accounted to the appellee for the premium was in substance that by custom he made transmittals monthly and that it was possible that he had not transmitted this premium but in point of fact he did not know.

As to what occurred between Larry T. Sullivan, Sr., and Norsworthy, it is disclosed that after receiving the notice the two had a conversation or conversations relative to the cancellation and Norsworthy promised to get other insurance. There is no competent evidence that in this was involved a question of the source of premium for new or other insurance. Again there is testimony to the effect that there was a possibility that this was discussed, but if so there was no memory of it by the person who gave the testimony.

In the light of this state of the record the conclusion is inevitable that there is no competent evidence on which to base a finding that the appellee either actually or constructively paid or tendered the unearned premium on the policy of insurance which was issued by the appellee to Larry T. Sullivan, Sr. The garnishment should have been sustained and a judgment rendered in favor of the plaintiff for the amount due and unpaid on the judgment of the plaintiff against the defendants with interest at the rate of 6 percent per annum from the date of the judgment, the costs of that action, and the costs of this garnishment proceeding.

The bill of exceptions indicates that the defendant Larry T. Sullivan, Sr., has paid a part of the judgment to the plaintiff. She is of course not entitled to recover that portion from the appellee.

The judgment of the district court is reversed and the cause remanded to the district court with directions to render judgment in favor of the plaintiff and against the appellee in accordance with the conclusion reached in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

LESLIE W. RUSH, APPELLEE, V. MORINE S. RUSH, APPELLANT.
108 N. W. 2d 79

Filed March 3, 1961. No. 34880.

1. Divorce. By the terms of section 42-303, R. R. S. 1943, no person is entitled to a divorce for any cause arising in this state unless he has had an actual residence in the state for at least 1 year next before bringing the suit with a bona fide intention of making this state his permanent home, unless the marriage was solemnized in this state and the applicant shall have remained herein from the time of marriage to the filing of the petition.
2. ———. By the terms of this section of the statute no person shall be entitled to a divorce for any cause arising out of this state unless one of the parties shall have resided within the state for at least 2 years next preceding the bringing of the action.
3. ———. Also by the terms of this section of the statute a person serving in the armed forces of this country who has been continuously stationed in any military base or installation for the period of 1 year shall be deemed a resident in good faith of this state and the county where such military base or installation is located for the period he has been so stationed.
4. ———. Under the law of this state no decree of divorce shall be rendered solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

Thomas J. Gorham, for appellant.

Richard A. Vestecka, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for divorce instituted in the district court for Lancaster County, Nebraska, by Leslie W. Rush, plaintiff and appellee, against Morine S. Rush, defendant and appellant. The case was tried to the court

and a decree was rendered granting an absolute divorce to plaintiff and awarding defendant alimony in the amount of $157 a month until the decree became final and thereafter $960 payable in monthly payments of $80 each. Defendant was awarded an attorney's fee for the services of her attorney in the amount of $250 and the costs were also taxed to the plaintiff. The defendant filed a motion for new trial which was overruled. From the decree granting the plaintiff a divorce and the order overruling the motion for new trial the defendant has appealed.

The grounds of the appeal are that the decision is not sustained by sufficient evidence; that there is insufficient corroborating evidence; and that the decree is contrary to law.

By the petition filed by the plaintiff it is declared that the parties were married in Mobile, Alabama, October 3, 1941; that the plaintiff has been for more than 1 year a resident of Lancaster County, Nebraska; that the defendant is a resident of Mobile, Mobile County, Alabama; and that no children were born of the marriage.

As grounds for divorce the plaintiff alleged that the defendant had been guilty of extreme cruelty of such a character as to destroy the objects of the marriage relationship between the parties. The defendant filed an answer denying the charges of cruelty. She did not file a cross-petition.

Particular acts of cruelty are charged but it is not deemed necessary to set them out herein. The reason for this lack of necessity is that the record viewed in the light most favorable to the plaintiff does not support a right of action for divorce in favor of plaintiff and against the defendant in the State of Nebraska, and further even if it did the decree would have to fail by reason of a total lack of corroboration of the charges made against the defendant.

The plaintiff was at the time of the commencement of this action and prior thereto a technical sergeant sta-

tioned at the Lincoln Air Force Base. He came to the base and to Nebraska September 13, 1958. The action was commenced September 14, 1959. The defendant was a resident of Mobile, Alabama, and was never in Nebraska until she appeared at the trial of this case which was started on May 9, 1960. The parties separated in Mobile, Alabama, on July 3, 1957, and were never together thereafter. He actually departed to serve in an overseas assignment from which, on his return, he came to the Lincoln Air Force Base. He did not communicate with her from the time he left until after his return.

On the trial of the case the plaintiff gave testimony as to claimed acts of cruelty practiced upon him prior to his departure in 1957. There was no direct or circumstantial evidence to support any of this. As to what occurred after he came to Nebraska he testified that he needed certain pictures as an aid to an application or effort to be assigned to recruiting service. Just what pictures he wanted were not particularly described but it appears they were of the defendant and of her son by an earlier marriage. She refused to send the pictures. A long distance telephone call or calls followed and it appears that the conversation was not pleasant. The plaintiff stated that in a letter he extended an invitation to her to come to Lincoln, Nebraska. By his testimony however he made it clear that he did not desire that she come, and he did not intend to allow her to do so. This is a fair résumé of what happened as between the parties in the State of Nebraska. There is no testimony corroborating this even if this could be recognized as cruelty which may be ground for divorce.

From the brief of the plaintiff it appears to be the theory that this refusal of pictures caused a reversion of plaintiff to the claimed cruelties occurring before July 3, 1957, and in consequence he became severely and seriously disturbed in mind as a result of which he

lost weight and lost efficiency in the performance of his duties.

There is testimony that at one time the plaintiff did manifest evidence of disturbance. The evidence however was of his condition and not of any act or failure to act on the part of the defendant.

Under the facts as disclosed by the record and the statutes of this state it becomes clear that the decree of divorce granted to the plaintiff is contrary to law.

Section 42-303, R. R. S. 1943, provides in part: "(1) No person shall be entitled to a divorce for any cause arising in this state who has not had actual residence in this state for at least one year next before bringing suit for divorce with a bona fide intention of making this state his or her permanent home, unless the marriage was solemnized in this state and the applicant shall have resided therein from the time of the marriage to filing the petition."

By the same section it is provided that for any cause arising out of the state no person shall be entitled to a divorce for any cause unless one of the parties shall have resided within this state for at least 2 years next before bringing the suit.

The plaintiff had the right to claim a residence in this state by further terms of this section. By these further terms it is provided that a person serving in the armed forces who has been continuously stationed in any military base or installation for the period of 1 year shall be deemed a resident in good faith of this state and the county where such military base or installation is located.

The action here was instituted on the second day after the expiration of the year which entitled the plaintiff to claim residence. The plaintiff, having had residence of but 1 year, could not legally maintain his action for divorce for any cause arising out of the state. He was barred from maintaining action until the expiration of 2 years after coming to this state.

If it be assumed, as it is not, that the plaintiff had the right under law to maintain his action for divorce it would be necessary to say that he has not shown by the proper weight of evidence that he was entitled to a decree of divorce from the defendant. There has been no corroboration of any acts of cruelty committed by the defendant in the State of Nebraska or elsewhere. A basic essential to the right to a decree of divorce is that there must be corroboration of the facts alleged in the petition.

Section 42-335, R. R. S. 1943, provides: "No decree of divorce and of nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." See, also, Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368; Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336.

The decree of the district court to the extent that it grants a divorce to the plaintiff and alimony to the defendant is reversed and the action dismissed. To the extent that it awards an attorney's fee to the defendant for her attorney and costs, it is affirmed. The defendant is awarded a fee of $250 for the services of her attorney in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

JEANETTA FISHER ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD, A CORPORATION, APPELLEE.
107 N. W. 2d 740

Filed March 3, 1961. No. 34882.

1. **Railroads.** It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is

about to cross the track to look and listen for approaching trains before driving onto the railroad track.

2. **Railroads: Automobiles.** Under the law of Missouri a driver of a motor vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains.
3. ———: ———. Under the law of Missouri the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law.
4. ———: ———. Under the law of Missouri, if the evidence establishes when demonstrated by actual measurements, tests, and photographs that it would have been physically impossible for the driver of a motor vehicle not to see an approaching train in time to avoid a collision if he had discharged the duty imposed on him by law to look for approaching trains, the negligence of the driver in failing to discharge such duty is the proximate cause of the collision.
5. ———: ———. Under the law of Missouri the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Paul P. Chaney and *Dwight Griffiths,* for appellants.

Mason, Knudsen, Dickeson & Berkheimer, J. W. Weingarten, Richard M. Duxbury, and *Jean B. Cain,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is an action for the recovery of damages for the wrongful death of Frank J. Fisher by reason of injuries sustained when the truck he was driving was struck by defendant's train at a railroad crossing about 2 miles north of Watson, Missouri. The Employers Mutual Casualty Company is a party plaintiff as the workmen's compensation carrier for the employer of deceased, who

became obligated for compensation payments and seeks reimbursement as authorized by section 48-118, R. R. S. 1943. The trial court directed a verdict against the plaintiffs at the close of plaintiffs' evidence and plaintiffs have appealed.

The action was brought under the wrongful death statute of Missouri, section 537.080, R. S. Mo. 1949. The plaintiffs pleaded the statutory and common law of Missouri. The sufficiency of the pleading of the common law of Missouri is questioned by the defendant, but since the common law of Missouri requires the same result as that in Nebraska in the instant case, the case will be decided on the statutory and common law of Missouri.

The evidence shows that the deceased was an employee of the Falls City Mercantile Company. On April 9, 1958, while in the course of his employment, the deceased was driving a truck belonging to his employer about 2 miles north of Watson, Missouri. He was traveling a regular route over which he had traveled many times previously. He was driving south on a gravel road and was struck by defendant's train at the point where the railroad track crosses the highway. The deceased died about 2 hours after the collision without making any statement as to what occurred.

The evidence shows that the railroad track lies in a northwest and southeast direction from the crossing where the accident occurred. The physical facts are shown by maps and photographs. In the angle formed by the road and railroad right-of-way to the north of the railroad crossing, were the farm buildings of Wincel and Rosena Murry. The closest farm building was approximately 800 feet north of the railroad crossing. To the west of the Murry residence were some peach trees along the railroad right-of-way, the south end of which were approximately 725 feet north of the railroad crossing. From the south end of the peach trees to the railroad crossing there was nothing to obstruct

the vision to the west. In other words, one approaching the railroad crossing from the north on the highway had a clear view for 725 feet to observe the approach of a train from the northwest.

Rosena Murry testified that she was working in her kitchen and saw the approach of the train as it crossed a bridge more than a half mile to the north. She observed the headlight on the diesel engine but heard no bell or whistle. Wincel Murry testified that he was scooping corn about 1,000 feet north of the railroad crossing. He stated that it was a nice clear day and that vision was good. He observed the deceased go south on the highway at a speed of 30 to 40 miles an hour. He saw the train approaching south of the railroad bridge. He said it was going at a speed of 70 to 75 miles an hour when it went by. He heard no whistle or bell, and said that he would have heard them if they had been sounded.

There is evidence which shows that 151 feet north of the railroad crossing and on the right side of the highway to one approaching from the north was a crossbuck sign on which were painted the words "Railroad Crossing." At a distance of 288 feet north of the railroad crossing on the right side of the road was a round highway sign with a black cross and the letters "RR" on a light background.

It is the contention of the plaintiffs that defendant's employees were negligent in operating the train in that they failed to sound a whistle and bell, as required by section 389.990, R. S. Mo. 1949, as amended. Applying our oft-repeated rule, that on appeal from a judgment dismissing plaintiff's case at the close of his evidence such evidence will be construed in the light most favorable to the plaintiff and every controverted fact will be resolved in his favor, we find that there was evidence of negligence on the part of the defendant. It is the contention of the defendant, however, that the deceased

was guilty of such negligence as would bar a recovery as a matter of law.

It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is about to cross it to look and listen for approaching trains before driving onto such railroad track. The driver of a motor vehicle about to drive onto a railroad track must exercise the highest degree of care to keep a lookout, and to observe and watch for the possible approach of trains. Where the driver of a motor vehicle when having a clear view along a railroad track drives upon the track in daylight when by looking he could have seen an approaching train, he is guilty of negligence as a matter of law. Failure of one, in approaching a railroad crossing with which he is familiar, to see that which is plainly visible is conclusive evidence of negligence. Where the negligence of a truck driver in failing to discharge his duty to look for approaching trains before driving onto a railroad crossing was the proximate cause of driver's death in a collision with the train, the railroad company is not liable in damages for the death of the driver. If a traveler, by looking, could have seen an approaching train in time to avert an accident, it will be presumed that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held to be negligence per se and constitutes the proximate cause of the accident, and bars a recovery. Lohmann v. Wabash R. R. Co., 364 Mo. 910, 269 S. W. 2d 885; Pipes v. Missouri Pacific R. R. Co. (Mo.), 338 S. W. 2d 30. See, also, Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679; Neusbaum v. Chicago & N. W. Ry. Co., 162 Neb. 754, 77 N. W. 2d 299.

We shall briefly review the facts in the record that bring the case within the foregoing rules. The deceased was familiar with the road he was traveling. There was a warning sign 288 feet north of the crossing and another 151 feet north of it. He had a duty to look

and listen as he approached the crossing. His view to the right was wholly unobstructed for 725 feet, during which distance the approaching train was in plain view. His duty required him to look to his right and to see the train that was in plain sight. He had the further duty to have his truck under such control that he could avoid any danger that his looking and listening disclosed, or, in the exercise of the highest degree of care, should have disclosed. He was charged with seeing that which was clearly visible and his failure to do so is negligence of such a degree as to bar a recovery as a matter of law under the applicable common law of the State of Missouri.

The trial court correctly directed a verdict for the defendant. The judgment of the trial court is affirmed.

AFFIRMED.

GEORGE BUSHEY, BY JUDITH ANN BUSHEY, HIS WIFE AND NEXT FRIEND, APPELLANT, V. GERALD FRENCH, APPELLEE.
108 N. W. 2d 237

Filed March 10, 1961. No. 34885.

1. **Trial.** In a civil action tried to a jury, in which either party is entitled to recover money from the adverse party, the jury is required to assess the amount of the recovery in its verdict as provided by section 25-1119, R. R. S. 1943.
2. **Trial: Judgments.** When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant.
3. **Trial.** The assessment of "$ no money" in such a verdict nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict for the plaintiff nor a verdict for the defendant, it is in effect no verdict at all.
4. ———. It is error for the trial court to accept such a verdict. It is the duty of the trial court in such a situation to point out its defects to the jury and send it back to the jury with directions to return a verdict in accordance with law and the instructions of the court.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded.*

John McArthur, for appellant.

Marti, O'Gara, Dalton & Sheldon, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is an action for the recovery of damages sustained in an automobile accident while plaintiff was an occupant of defendant's automobile. The jury returned the following verdict: "We, the Jury, duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of his recovery against defendant in the sum of $ *No Money.*" The trial court entered a judgment for the defendant on the verdict. Plaintiff has appealed.

The only question raised by the appeal is: When the question of liability is for the jury and plaintiff has adduced evidence of damage for injuries sustained, is a verdict for plaintiff in the amount of "$ No Money" contrary to law and insufficient to sustain a judgment for defendant?

This precise question does not appear to have been before this court. The rule in other jurisdictions is: A verdict finding for the plaintiff and assessing the amount of his recovery against the defendant in the sum of "$ no money" confers no authority to enter a judgment upon it. Klein v. Miller, 159 Ore. 27, 77 P. 2d 1103, 116 A. L. R. 820; Ridenour v. Lile, 93 Ohio App. 435, 114 N. E. 2d 166; Sellers v. Mann, 113 Ga. 643, 39 S. E. 11. In the Klein case the court said in considering a similar verdict: " 'It is impossible to ascertain from this verdict whether the jury intended to find for the plaintiff or for the defendants. Because of its uncertainty in this respect, it is not sufficient to support a valid judgment.' McLean v. Sanders, supra. * * *

In the case at bar the verdict is not for the defendant. Its assessment of 'no damages' nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict in favor of plaintiff nor a verdict in favor of defendant, it is in effect no verdict at all."

In the Ridenour case, after holding a similar verdict insufficient to support a valid judgment because it was impossible to ascertain from such verdict whether the jury intended to find for the plaintiff or the defendant, the court said: "In the present case, upon the return of the verdict the trial court erred in accepting same. It was the duty of the trial court to point out this defect to the jury and send it back with instructions either to assess the damages recoverable by defendant from plaintiff or else return a verdict finding a certain definite sum due plaintiff from defendant on plaintiff's petition, a certain definite sum due defendant from plaintiff on defendant's cross-petition, strike a balance and make a finding of a definite sum in dollars and cents due either plaintiff or defendant, as the computation showed. This error rendered the entire verdict invalid both as to the issues raised by the petition and the answer thereto and as to the issues raised by the cross-petition and the reply."

We point out that the Nebraska statute, as in the jurisdictions cited, provides that when either party is entitled to recover money from the adverse party the jury in its verdict must assess the amount of recovery. § 25-1119, R. R. S. 1943.

The defendant relies upon Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259. In that case the jury returned a verdict for plaintiff and assessed the amount of her recovery at "$ none." The court refused to accept the verdict in that form, telling the jury that if it found for the plaintiff she was entitled to some damages. The jury after further deliberation returned a verdict in the sum of $75. The defendant filed a motion for judgment on the first verdict for "$ none." Plaintiff filed

a motion for a new trial, which was granted. The judgment of the trial court was affirmed for the reason that the verdict of $75 was so grossly inadequate that the trial court properly granted a new trial. The difficulty arises in that this court cited and distinguished the case of Royal Indemnity Co. v. Township of Island Lake, 177 Minn. 408, 225 N. W. 291. This case appears to be in conflict with the cases hereinbefore cited in this opinion. While it was clearly distinguishable on the facts in the Ambrozi case, we do not agree with its reasoning as it applies to the case presently before us. We think the reasoning of the cases hereinbefore cited should be adopted as the law of this state, particularly in view of section 25-1119, R. R. S. 1943. See Annotation, 116 A. L. R. 828. In any event, the Ambrozi case does not conflict with our holding in the present case since it cannot be disputed that plaintiff in the instant case sustained pain and suffering and some disability for which he was entitled to be compensated if liability was established.

We conclude that the trial court erred prejudicially in receiving the verdict, in rendering judgment for the defendant thereon, and in not sustaining plaintiff's motion for a new trial.

The defendant asserts that the verdict, even if erroneous, is not prejudicially so for the reason that defendant's motion for a directed verdict should have been sustained. Defendant's position is correct if the trial court erred in overruling the motion for a directed verdict. This question requires a consideration of the evidence.

Plaintiff's evidence is to the following effect: Plaintiff asked defendant to drive him to a certain place of business in Lincoln and agreed to pay him $2 for so doing. They preceeded north on Tenth Street, the defendant doing the driving and plaintiff riding with him in the front seat. It was raining and snowing. There were from 2 to 3 inches of slush and snow covering the

street. Plaintiff testified that defendant on several occasions turned out of the tracks made by other vehicles to splash water, slush, and snow on approaching vehicles. Plaintiff protested this conduct on two occasions without effective result. Immediately preceding the accident defendant again pulled left into the deeper slush, his car skidded, the rear end slid around to the right and projected the car into the path of a car coming from the north, resulting in a collision. Plaintiff testified to a statement by defendant tending to establish defendant's responsibility for the accident. Plaintiff was seriously injured. Plaintiff suffered a broken rib and injury to his abdomen. It was necessary that he submit to surgery, at which time about one-fourth of his liver was removed. He also suffered a contusion of the right lung. He was in Lincoln General Hospital from March 4 to March 31, 1959. He was in the Lincoln Air Force Base hospital from March 31 to May 7, 1959. He testified to pain and suffering endured by him and to the limitations of physical activity resulting from his injuries. There is evidence that plaintiff's medical and hospital bills were paid by the government. The evidence is clear that if liability attached to the defendant, plaintiff is entitled to recover for pain and suffering, and for any temporary and permanent disability sustained.

The defendant testified to a different story as to how the accident happened, and denied making any statements indicating negligence on his part. It is not necessary to detail the evidence of the defendant other than to show a conflict in the evidence requiring its submission to a jury.

We conclude that the facts as testified to by the parties and their witnesses were very conflicting and raised issues to be determined by a jury. The contention of defendant that he was entitled to a directed verdict is without merit. We find that other contentions asserted by the defendant in support of the judgment rendered

for the defendant on the verdict returned are likewise without merit.

We hold the verdict returned by the jury was insufficient to sustain a judgment for the defendant. The trial court erred, therefore, in rendering such judgment. The judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

WENKE, J., not participating.

EDITH WRONA, APPELLANT, V. FRED A. SCHRAWGER, APPELLEE.
108 N. W. 2d 95

Filed March 10, 1961. No. 34886.

1. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.
3. **Trial.** If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

Tesar & Tesar, for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought by Edith Wrona as

plaintiff in the district court for Douglas County, against Fred A. Schrawger, defendant, to recover damages for personal injuries sustained by the plaintiff when she was struck by an automobile driven by the defendant while she was crossing a street in a crosswalk in the city of Omaha. At the close of the plaintiff's case the defendant made a motion for a directed verdict in favor of the defendant or, in the alternative, to dismiss the plaintiff's petition. The trial court sustained the defendant's motion, dismissed the plaintiff's petition and cause of action, and rendered judgment for the defendant. The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff appeals.

The plaintiff's petition, insofar as necessary to consider here, alleged that the defendant's negligence and carelessness were the proximate cause of the accident and injuries sustained by the plaintiff in the following particulars: In failing to stop his automobile in compliance with the red traffic signal for traffic traveling east and west at the intersection; in failing to maintain a lookout for the plaintiff who was lawfully crossing the street in the pedestrian crosswalk; in failing to sound his horn or give any signal to the plaintiff of his approach to the intersection; in failing to apply his brakes in time to avoid striking the plaintiff; and in failing to yield the right-of-way to the plaintiff who was crossing the intersection and street with the traffic control lights in her favor.

The defendant's answer to the plaintiff's petition alleged that if the plaintiff sustained any injuries or damages, the same were the direct and proximate result of her own negligence and want of care which caused and directly contributed to cause the accident.

The plaintiff assigns as error that the trial court erred in dismissing the plaintiff's petition and cause of action; and that the trial court's findings and judgment are not supported by the evidence and are contrary to law.

The plaintiff testified that on October 25, 1958, her husband picked her up in his automobile from her place of work about noon, and let her out at Fourteenth and Douglas Streets in Omaha; that Fourteenth Street is a one-way street for traffic moving to the south, and Douglas Street is a one-way street for eastbound traffic; that after she left her husband's car she went to the southwest corner of the intersection of Douglas and Fourteenth Streets; that the traffic signals on Douglas Street at that time were red; that she stood on the corner and waited for the signal light to change, and when it changed she started to cross Douglas Street in the crosswalk which she estimated to be 10 or 15 feet wide; that she believed she was walking in about the middle of the crosswalk; and that after the signal light turned green she took 7 or 8 steps into the street when she was struck by the defendant's automobile. This witness further testified that she first noticed the defendant's automobile when she had taken 2 or 3 steps out into the street in the crosswalk. At that time the defendant's automobile was 4 or 5 car lengths, or about 70 or 75 feet, west of the crosswalk. She kept on walking, believing that the defendant would stop his automobile. She was not able to tell the speed of the defendant's automobile, but testified that it was moving and that the left front fender of the defendant's automobile struck her on her left hip while she was in the crosswalk. This witness further testified that she believed she screamed just before being struck by the defendant's automobile; that after being struck by it she was in a sitting position on the pavement, facing east; that from the time she left the curb until she was struck by the defendant's automobile she heard no sound of a horn or warning of any kind; that the defendant's automobile did not deviate or turn in any direction from the time she first saw it; and that there were other cars to the north of the defendant's car which were standing still waiting for the traffic light to change in their favor so they

could proceed east. After the impact, the plaintiff was assisted by two boys who helped her back to the curb, and she waited until the police came and then was taken to the Douglas County Hospital.

The cross-examination of the plaintiff showed that at the time she was struck by the defendant's automobile she had reached the north edge of the first driving lane on the south side of Douglas Street.

A detective sergeant connected with the Omaha police department testified that on October 25, 1958, he was let out of a police car by his partner at the corner of Fourteenth and Douglas Streets; that he was on duty and was going to the Chrysler Cafe on the south side of Douglas Street between Fourteenth and Fifteenth Streets; that he went to the northwest corner of the intersection and waited for the traffic light to change so that he could walk south on the west crosswalk across Douglas Street; that he saw the plaintiff facing him, waiting for the signal light to change; that she was on the southwest corner of the intersection; and that as the signal light changed, this witness started to walk south in the crosswalk and the plaintiff started to walk north in the crosswalk on Douglas Street. This witness further testified that when the plaintiff left the curb an automobile came from the west proceeding east and struck the plaintiff on her left side with its left front headlight and fender; and that the plaintiff rolled off the car and sat on the street facing east. This witness further testified that he believed the plaintiff was out in the crosswalk 6 or 7 steps, or possibly 15 to 18 feet, into the intersection at the time the accident occurred; that the automobile that struck the plaintiff was traveling in the first traffic lane south on Douglas Street; that the crosswalk on Douglas Street is a marked crosswalk; that the plaintiff was walking near the marked line of the crosswalk closest to the west side thereof and was within the crosswalk; that as the defendant's automobile struck the plaintiff it made a noise like a

"thump"; and that the defendant applied his brakes and his automobile "rocked." This witness further testified that when the defendant's automobile stopped, the front of it was mostly through the crosswalk and fairly close to the east boundary of the crosswalk; and that after the accident this witness went directly across the street and told the defendant to shut off the motor of his automobile. He talked to the defendant and asked him what happened. The defendant told him that he had brought his wife downtown, let her out at Brandeis store, and was heading east on Douglas Street. He had a dog in his lap and it started to vomit. He endeavored to push the dog aside to keep it from vomiting on him, and he did not see the plaintiff.

A police officer assigned as investigator for the traffic bureau of the city of Omaha testified that he investigated the accident, and when he arrived at the scene of the accident he talked to the defendant. The defendant stated that he was proceeding east on Douglas Street and the signal light was red for eastbound traffic; that he could not state how far away from the intersection he noticed the traffic light; that arriving at the intersection he noticed the dog was sick and tried to push it away from him; that his automobile was traveling about 5 to 8 miles an hour; and that he struck a pedestrian and did not see her until the time of impact. The defendant pointed out to this witness the point of impact, and it was measured and found to be 20 feet north of the south curb of Douglas Street and about 1 foot east of the west line of the crosswalk, but inside the confines of the crosswalk. Douglas Street is 60 feet wide at this point, and there are four traffic lanes and two parking lanes across Douglas Street.

The following are applicable to the instant case.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted an behalf of the party against whom the mo-

tion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614. See, also, Buie v. Beamsley, *ante* p. 181, 105 N. W. 2d 738.

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right-of-way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices."

"If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him." Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633. See, also, Buie v. Beamsley, *supra*.

We conclude that under the facts as shown by the record in this case, the questions of the negligence of the defendant while driving his automobile at the time of the accident, and the contributory negligence of the plaintiff, if any, are questions of fact to be determined by a jury.

For the reasons given herein, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WENKE, J., not participating.

DUNLOP TIRE & RUBBER CORP., A CORPORATION, APPELLANT, V. KELLY P. RYAN ET AL., APPELLEES.
108 N. W. 2d 84

Filed March 10, 1961. No. 34891.

1. **Limitations of Actions: Pleading.** A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer.
2. ———: ———. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on.
3. **Contracts.** As a general rule a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed.
4. ———. The general rule in this jurisdiction is that the state in which the last act of a contract is performed which is necessary to the validity of the contract is the situs of the contract.
5. **Contracts: Conflict of Laws.** A general rule in this jurisdiction is that a contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens.
6. **Limitations of Actions: Contracts.** The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state.
7. **Limitations of Actions: Guaranty.** An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limitations in Nebraska.

APPEAL from the district court for Washington County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Silverman & Silverman, for appellant.

Sidner, Lee, Gunderson & Svoboda and *Chester N. Sutton,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Dunlop Tire & Rubber Corp., a corporation, plaintiff and appellant, against Kelly P. Ryan and Boyd Hammond, defendants and appellees, to recover a judgment on a written guaranty of payment for goods, wares, and merchandise sold by the plaintiff to Kelly Ryan Equipment Company. The action was commenced by the filing of a petition in the district court. The defendants by separate general demurrers asserted that the petition failed to state a cause of action. The demurrers were sustained. Thereafter judgment was rendered dismissing the action. From this judgment the plaintiff has appealed.

By the petition, which was filed October 8, 1959, it is pleaded, to the extent necessary to set forth here, that the plaintiff was duly organized and existing under the laws of the State of New York, and the defendants are residents of Washington County, Nebraska; that on or about February 6, 1950, the defendants executed and delivered to plaintiff a guaranty in writing wherein they guaranteed the payment to the plaintiff of any and all indebtedness then existing or any future indebtedness thereafter incurred by Kelly Ryan Equipment Company on account of goods, wares, and merchandise sold to it; and that the guaranty was not to exceed $10,000. A copy of the written guaranty was attached to and made a part of the petition.

It was further alleged that on July 23, 1954, the plaintiff sold to Kelly Ryan Equipment Company goods, wares, and merchandise of the reasonable value of $1,694; that no portion of this sum has been paid; that this amount is due; and that it is due the plaintiff from the defendants.

It was further pleaded that by the terms of the guaranty it was provided that: " 'This guaranty shall be

governed by and construed under the laws of the State of New York' "; that under the laws of the State of New York the limitation on contracts, express or implied, is 6 years; and that said law was and is now in full force and effect. The prayer was for judgment for $1,694 with interest and costs in the action. It is assumed by the plaintiff that the declaration of the guaranty that it shall be construed under the laws of New York was inclusive of application of the New York statute of limitations. There is no specific declaration relating to any statute of limitations.

The theory on which the demurrers were sustained apparently was that by the statute of limitations of the State of Nebraska action was barred, which bar was apparent on the face of the petition. This is the theory on which the parties have assumed that the decision was rendered.

The controlling rule in this area is that a petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. See, Dufrene v. Anderson, 67 Neb. 136, 93 N. W. 139; Brainard v. Hall, 137 Neb. 491, 289 N. W. 845; Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

The theory of the plaintiff on the appeal is that under the terms of the guaranty, as disclosed by the petition, the statutes of Nebraska did not control the limitation of the time within which the action could be commenced but that it was controlled by the limitation contained in the statutes of the State of New York, and that in this light the judgment was erroneous. The plaintiff does not contend that the judgment was erroneous if the right to institute action was controlled by the Nebraska statute of limitations. The limitation of the Nebraska statute is 5 years and the pleaded limitation of the New York statute is 6 years.

The defendants assert in their brief that the statute of New York has not been pleaded sufficiently to permit

of its consideration here, and for that reason the judgment should be affirmed. In the early case of Minneapolis Harvester Works v. Smith, 36 Neb. 616, 54 N. W. 973, this court said: "In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on." The pleading which was the basis of this pronouncement was the following, which was found to be sufficient as the pleading of a foreign statute: " 'That by the laws of Iowa the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrued.' "

The pleading in the petition in this case of the statute of New York is as follows: "That under the laws of the State of New York, the limitation on contracts, express or implied, is six years." A comparison of this with what was said in Minneapolis Harvester Works v. Smith, *supra*, leads to the conclusion that the statute of New York was sufficiently pleaded.

The question remaining for determination is that of whether or not the allegations of the petition sufficiently state a cause of action requiring application of the statute of limitations of the State of New York. It is to be observed that the petition on its face does not declare the place where the guaranty was made and neither does it declare a place of performance in case performance is called for. The instrument however by its heading indicates that it was executed in Nebraska. As a part thereof appears "Blair, Nebraska Feb. 6, 1950." There is no allegation in the petition which declares that the guaranty or agreement exacts performance or part performance by the defendants anywhere outside the State of Nebraska. Also from other terms contained in the agreement an inescapable inference flows that the agreement and the guaranty became effective with

the signing by the defendants. By these terms it is declared that notice to the defendants of acceptance of the guaranty by the plaintiff was waived. In other words nothing remained to be done after signing to validate and make effective the guaranty.

In the light of this it becomes apparent the last act performed to constitute and make effective the guaranty was done and performed in the State of Nebraska. Accordingly, on the petition the guaranty must be regarded as a Nebraska transaction.

The general rule is stated in 17 C. J. S., Contracts, § 356, p. 813, as follows: "The place where a contract was made is to be determined in accordance with the intention of the parties. As a rule, a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed."

In Avondale v. Sovereign Camp, W.O.W., 134 Neb. 717, 279 N. W. 355, this court said: "The authorities are to the effect that the state in which the last act of a contract is performed is the situs of the contract." See, also, McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866, 122 N. W. 27, 23 L. R. A. N. S. 968; Young v. Order of United Commercial Travelers, 142 Neb. 566, 7 N. W. 2d 81; Refrigeration & Air Conditioning Institute, Inc. v. Hilyard, 146 Neb. 42, 18 N. W. 2d 548.

In the case here the portion of the general rule relating to intention cannot be resolved in favor of plaintiff since, as indicated, there is nothing in the petition to indicate that there was any intention that the contract should be regarded as having been made at any place other than Nebraska. The guaranty must therefore be regarded as a Nebraska obligation or agreement, and any right of action arising under it arose in the State of Nebraska.

If it be assumed, as the plaintiff has done, that the declaration of the guaranty that the laws of New York shall include the statute of limitations it could avail

the plaintiff nothing in this case. It could have application only if a cause of action arose in one state and the action to enforce it was instituted in another. It could have no application in a case where the state in which the cause of action arose and in which the action to enforce it was the same. As to whether or not a statute of limitations may be treated as a matter of substance in the construction of contractual obligations there is a lack of uniformity of opinion in the reported cases. But few courts of last resort have spoken on the subject. The subject is considered in Annotation, 68 A. L. R. 217, and Annotation, 146 A. L. R. 1356.

This court has not passed upon the subject directly and specifically. The following has been stated in Kindler v. Kindler, 169 Neb. 153, 98 N. W. 2d 881: "The general rule is that a contract valid under its governing law is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or would violate the settled public policy of the forum or would work an injury to the state or to its citizens." See, also, 15 C. J. S., Conflict of Laws, § 4, p. 858, § 11, p. 880.

By the petition was pleaded a cause of action based upon a written guaranty entered into in the State of Nebraska seeking in the courts of Nebraska enforcement of an obligation pursuant to an agreement which extended the limitation upon the right to maintain action for recovery beyond the period fixed by the statutes of Nebraska.

The attempt to so extend the right was void. In Miller v. State Ins. Co., 54 Neb. 121, 74 N. W. 416, 69 Am. S. R. 709, this court said: "The statutes of this state provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy

and will not be enforced by the courts of this state." This pronouncement was approved in the following cases: Omaha Fire Ins. Co. v. Drennan, 56 Neb. 623, 77 N. W. 67; Grand View Building Assn. v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246, affirmed 203 U. S. 106, 27 S. Ct. 27, 51 L. Ed. 109; Williams v. Western Travelers Accident Assn., 97 Neb. 352, 149 N. W. 822; Avondale v. Sovereign Camp, W. O. W., *supra;* Young v. Order of United Commercial Travelers, *supra.*

This rule of course does not apply to a valid contract entered into in a foreign state. The rule in such instance is that where a provision of a contract, valid in a foreign state where the contract was entered into is a bar to recovery, such provision is required to be enforced in this state under the full faith and credit clause of the Constitution of the United States, although such provision is void under the laws of this state. See Young v. Order of United Commercial Travelers, *supra.*

In the light of the observations contained herein it must be said that the petition in this case failed to state a valid cause of action and accordingly the court did not err in sustaining the demurrer and in rendering judgment of dismissal.

The judgment is affirmed.

AFFIRMED.

WENKE, J., not participating.

LEONARD GAMBLE, APPELLEE, V. EDWARD GAMBLE ET AL., APPELLANTS.
108 N. W. 2d 92

Filed March 10, 1961. No. 34903.

1. **Master and Servant. In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers to which an ordinarily prudent man would refuse to subject himself, he is guilty of contributory negligence, particularly where he has created the danger.**

2. ———. Where an employee, capable of understanding and discretion, fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, he will ordinarily be deemed to have assumed the risk, and no liability attaches to the employer.

3. ———. A servant cannot undertake the performance of a service where the danger is so obvious that injury could be anticipated, even in obedience to the command of the master, and then maintain a cause of action for injuries sustained. The servant will be deemed to have assumed the risk.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions.*

Evans & Kelley, Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellants.

Sam S. Diedrichs, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

Plaintiff brought this action against the defendants to recover damages for personal injuries sustained when plaintiff's horse slipped and fell on him while he was engaged in rounding up cattle as an employee of defendants. The jury returned a verdict for the plaintiff and a judgment was rendered thereon. The defendants have appealed.

On January 18, 1957, plaintiff, Leonard Gamble, was employed as a ranch hand by his two uncles, the defendants Edward and Henry Gamble. We shall hereafter refer to the parties by their given names. The evidence shows that Leonard had worked for Edward and Henry for 18 months before the accident occurred which resulted in this litigation. Leonard was 23 years of age and experienced in caring for and handling cattle, including the use of a horse in moving them. Leonard had been raised in the neighborhood and was familiar

with the terrain of the Gamble ranch, including the school section on which the accident happened.

On the morning of January 18, 1957, Edward informed Leonard and Lane Dikeman, another ranch hand, that the three of them would move the steers on the school section to the home place because of his fear of a storm. It was a clear, sunny day. There was some snow and ice on the ground. There had been some thawing which resulted in slippery spots that made it more dangerous than usual in riding a horse. When told that they were to move the cattle Leonard said: "Don't you think it is awful slick to go there?" Edward replied: "We got to get them out that morning." Later Leonard told Edward it was getting "awful slick" and he didn't think they should get the cattle that day. Leonard testified that Edward said: "Well, you know what you can do." Leonard testified that he construed the latter statement to mean that he must help get the cattle or quit his job. In view of the verdict for plaintiff we accept Leonard's version of these conversations under the familiar rule that on appeal from a judgment rendered on a jury verdict the evidence will be considered in the light most favorable to the successful party.

The evidence shows that Leonard went to his own home for lunch, saddled his own horse which was not shod, met Edward and Dikeman at a designated point, and they proceeded to the school section. The evidence shows that the school section had a very rough terrain. It consisted of numerous ridges and canyons which, particularly in the south half of the section, were dangerous for a horseman because of the steepness of the canyon banks. After entering the pasture Edward directed Leonard to round up the cattle in the south part of the section, saying that he and Dikeman would work the north part.

Leonard thereupon proceeded south, riding the crest of a ridge until he came to one of the few places where

he could descend to the canyon floor with a horse. He rode down the slope from the ridge until the path led him to the steep canyon bank where the descent was usually made. Leonard estimated that the steep portion of the canyon bank was about 15 feet high and that the path at this point was quite steep for a horse to negotiate in getting to the bottom of the canyon. He observed that there was some snow and ice on the path and there had been some thawing, which made the path very slick in spots. He testified that due to the dangerous condition of the path he decided to dismount and lead the horse to the bottom of the canyon. While he was dismounting for this purpose the horse slipped and fell on him, causing very serious injuries. It is for the injuries thus sustained that the instant case was brought.

It is the contention of the plaintiff that it was negligence on the part of defendants to direct or order plaintiff to round up cattle in this canyon pasture when the surface of the ground was slick, as we have hereinbefore described. The defendants deny that the facts establish any negligence on their part and assert that in any event plaintiff assumed the risk of the danger of which he had complete knowledge.

"As a general rule it is the duty of a servant to take such precautions against known or apparent dangers arising from defective or dangerous machinery, appliances, tools, or places as an ordinarily prudent man would take under the same or similar circumstances, especially where the servant is in control of the cause or subject of danger." 56 C. J. S., Master and Servant, § 454, p. 1283.

This rule has been applied in this jurisdiction. In Lownes v. Furman, 161 Neb. 57, 71 N. W. 2d 661, a case similar in principle in which an employee, with knowledge of a defective door-covering to a moving blower on a feed grinder, attempted to close the door-covering without shutting off the power, which resulted in the

loss of the ends of his fingers, this court said: "We think appellant, being fully aware the machine was operating while he attempted the makeshift plan for keeping the door closed, assumed all risk resulting therefrom and, in addition thereto, was contributorily negligent as a matter of law, in a degree sufficient to defeat any right to recover that he might otherwise have had, by permitting his fingers to extend into the blower casing while the machine was operating."

In the foregoing case we cited with approval the rules announced in Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279, as follows: "In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger.

"As a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes the risk of injury incident thereto."

It is urged that the rule is different where the master directs or orders the performance of the work. In Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951, the rule is stated as follows: "A servant can not undertake the performance of a service, even in obedience to the command of the master, where the danger is so obvious that injury would be inevitable, and if he does so, he will be held guilty of contributory negligence."

It is the rule in this state that where the master orders a servant into a place of apparent danger, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, and the servant is injured, the servant is guilty of negligence sufficient to bar a recovery. This is on the basis

that an employee who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, is chargeable with negligence or contributory negligence in such a degree as to bar a recovery. Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Ring v. Kruse, *supra*. In such cases an employee will ordinarily be deemed to have assumed the risk of danger. Groat v. Clausen, 139 Neb. 689, 298 N. W. 563; Corley v. Hubbard, 129 Neb. 38, 260 N. W. 551.

Plaintiff relies on Sioux City & P. R. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. R. 724; Lee v. Smart, 45 Neb. 318, 63 N. W. 940; Dehning v. Detroit Bridge & Iron Works, 46 Neb. 556, 65 N. W. 186, and other cases of similar import. These cases are grounded on an exception to the general rule and have no application to the case at bar.

Under the foregoing rules the plaintiff assumed the risk of the dangers that were obvious and admittedly known to him. The trial court was clearly in error in not directing a verdict in favor of the defendants. The judgment is reversed and the cause remanded to the district court with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DONALD NOLL, APPELLANT.
108 N. W. 2d 108

Filed March 10, 1961. No. 34918.

1. **Statutes.** In general, the word "may" used in statutes will be given ordinary meaning unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory.
2. ———. In defining the term "discretion" when invoked as a

guide to judicial action, it means a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

3. **Health: Statutes.** The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others.
4. ———: ———. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society.
5. ———: ———. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires.

APPEAL from the district court for Stanton County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Robert E. Otte, for appellant.

Clarence A. H. Meyer, Attorney General, and *Dwain L. Jones*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This is an action for the release of a sexual psychopath pursuant to the written recommendation of the superintendent of the Lincoln State Hospital.

Appellant, hereinafter called defendant, appeals from an order denying his release. Defendant raises three issues. First, that the statute only gives the court the discretion to release or put him on probation, and that it does not have authority to recommit him. Second, if the court does have discretion to recommit, it abused that discretion. Third, if the hospital superintendent's recommendation for release is not the standard or criteria for release, the statute is unconstitutional.

The facts are as follows: Defendant was adjudged to be a sexual psychopath December 7, 1957, and was committed to the Norfolk State Hospital. He later was

transferred to the Lincoln State Hospital where he is now confined. On January 26, 1960, the superintendent of the Lincoln State Hospital wrote the trial judge as follows: "Donald Noll was committed to the Lincoln State Hospital as a sexual psychopath under your jurisdiction, and received on December 17, 1957. He has been in the hospital continuously since that date. It is the opinion of our psychiatric staff that Mr. Noll has received maximum benefit from his treatment. Therefore, in accordance with Nebraska statute, Section 29-2906, I am recommending that Donald Noll be discharged from the Lincoln State Hospital. Pending approval by your Court, we shall await further orders from you." Thereafter, defendant filed his petition for release. The State answered, and the matter proceeded to trial on July 8, 1960. The trial court, after hearing, ordered defendant returned to the Lincoln State Hospital, not to be discharged until further order of the court. Defendant appeals.

We find that the original petition alleged three acts of exhibitionism on the part of defendant. At the hearing, where he was represented by counsel, defendant, in addition to the acts charged, admitted that on August 15, 1957, he induced a 4½-year-old girl to come into his home in Norfolk. He admitted he took off some of her clothes, and some of his own, and that he put his body against her. This certainly was a serious sexual offense. Defendant further admitted that he was charged in 1952, in Spokane, Washington, with three counts of indecent exposure, and was sentenced to the State Penitentiary at Walla Walla on two of those counts. He was discharged from the penitentiary April 30, 1954.

There is no proof of any nature in the record that defendant has recovered from the condition for which he was committed. There is no proof that he would no longer constitute a danger to society. In fact, the two psychiatrists who testified for defendant agree that

he is still a sexual psychopath within the definition of the statute.

Section 29-2901, R. R. S. 1943, provides in part: "* * * the term sexual psychopath shall mean any person who, by a course of misconduct in sexual matters, has evidenced an utter lack of power to control his sexual impulses and who, as a result, is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires."

One of defendant's psychiatrists, the assistant superintendent of the Lincoln State Hospital, goes so far as to say that if defendant is released, he is of the opinion defendant will resort to his previous sexual psychopath behavior. In this state of the record, the trial court did not abuse its discretion in recommitting defendant, if it had such discretion.

Section 29-2906, R. R. S. 1943, provides as follows: "After commitment of any person found to be a sexual psychopath, such provisions of Chapter 83, article 3, as are not in conflict with the provisions of this section shall be applicable with respect to the care and custody of such sexual psychopath; Provided, that regarding the right of discharge provided by section 83-342, the superintendent of the institution to which commitment is made shall make written recommendation for discharge to the court from which the person was committed. *Such court after considering such recommendation may at its discretion free or release on probation the person committed.*" (Italics supplied.) It is defendant's contention that the trial court must accept the superintendent's recommendation and is limited to one of two alternatives, whether to free defendant or to release him on probation. With this contention we do not agree.

Section 49-802, R. R. S. 1943, which was effective when the Sexual Psychopath Act was adopted, provides in part: "(1) When the word *may* appears, permissive or discretionary action is presumed. When the word *shall*

appears, mandatory or ministerial action is presumed." (Italics supplied.)

We held in Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119: "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory."

It is to be noted that section 29-2906, R. R. S. 1943, incorporates into the Sexual Psychopath Act such provisions of Chapter 83, article 3, R. R. S. 1943, covering the care, custody, and release of mentally ill as are not in conflict with specific provisions of the Sexual Psychopath Act. It is apparent that the Legislature intended by the specific reference to the right of discharge provided by section 83-342, R. R. S. 1943, to deprive the authorities at a state hospital of any right to discharge sexual psychopaths who had not been cured. It clearly limits their sole authority to the making of a recommendation which would be considered by the committing court. We find that it is the obvious intent of the entire act to place the right of discharge entirely with the court. We hold that the court, if it concurs in the recommendation of the superintendent, may free a sexual psychopath or release him on probation. If, however, it does not concur, he should be retained in the institution. Such discretion is not to be exercised at the arbitrary whim of the judge, but is for the purpose of giving effect to the intention of the Legislature and the spirit of the act. Its exercise must be in furtherance of justice, governed by sound principles and just reason, to be determined by the facts and circumstances of the case.

In Pettegrew v. Pettegrew, 128 Neb. 783, 260 N. W. 287, defining the term "discretion," we said: " 'When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law,

and directed by the reason and conscience of the judge to a just result.' "

It is very evident that the Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. This act was not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue to be a hazard to society. The obvious intent of the act is to require his confinement until such time as he is not "likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires."

Most states have enacted sexual psychopath acts in some form. They differ materially. Yet, in all of them, the primary purpose, the one mentioned first, is the protection of society. Their secondary purpose, the one always mentioned last, is the treatment of the person committed and his protection. In re Craft, 99 N. H. 287, 109 A. 2d 853; People v. Willey, 128 Cal. App. 2d 148, 275 P. 2d 522.

Defendant admits that the procedure for commitment provided by the Sexual Psychopath Act is constitutional. He contends, however, that the act does not provide proper criteria for the release of sexual psychopaths, and for that reason defendant is deprived of due process of law.

Due process of law is a vague concept. In Solesbee v. Balkcom, 339 U. S. 9, 70 S. Ct. 457, 94 L. Ed. 604, the dissenting opinion has the following language: "It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to

be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

We do not agree with defendant that no standards are found for the release of persons committed as sexual psychopaths. Definite standards do exist and are incorporated into the act. As noted above, the provisions of Chapter 83, article 3, R. R. S. 1943, are incorporated into the Sexual Psychopath Act. Section 83-340, R. R. S. 1943, provides that any patient who is cured shall be immediately discharged. Section 83-342, R. R. S. 1943, provides a method for the release of dangerous patients who are not cured, but puts the discretion in the court to determine whether such person may safely be released. Section 83-343, R. R. S. 1943, provides that the writ of habeas corpus shall be available to any person confined in a state hospital and that the decision of the judge shall not bar the issuance of a writ a second time whenever it shall be alleged that the person confined has been cured.

It is obvious that the Legislature in the Sexual Psychopath Act attempted to achieve two principal objectives. The first was the protection of society through the removal of the offender who cannot refrain from certain acts of behavior. The second was his treatment leading to his restoration to society as a healthy contributing member. In this respect, the act is in perfect harmony with the basic objectives of our legal system.

It is also obvious that the Legislature had in mind that the type of conduct covered by the Sexual Psychopath Act was not the same as that which might be displayed by a person who was mentally ill. The Legislature has very properly seen fit to vest discretionary

power in the court for the release of committed sexual psychopaths. There are ample standards available for testing the soundness of such discretion upon appeal. There is no denial of due process.

We find the trial court did not abuse its discretion and properly recommitted defendant to the Lincoln State Hospital. The judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., not participating.

GLORIA RUTH IVINS, APPELLANT AND CROSS-APPELLEE, V. JAMES RUSH IVINS, APPELLEE AND CROSS-APPELLANT.
108 N. W. 2d 99

Filed March 17, 1961. No. 34869.

1. **Pleading: Trial.** Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling.
2. **Divorce: Appeal and Error.** On appeal in an action for divorce the cause is tried de novo in this court.
3. **Divorce.** A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated.
4. ———. There is no rule whereby to measure the amount of corroboration required but each case must be decided upon its own facts and circumstances.
5. ———. The charge of adultery must be clearly established by competent testimony before a decree of divorce may be granted on that ground.
6. ———. In an action for divorce on the ground of adultery it is not necessary to show an overt act of adultery but before it may be said that the charge has been proved the evidence of facts and circumstances must be such as to lead the mind of a just and reasonable person to the conclusion of guilt.
7. **Divorce: Evidence.** The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized.
8. **Divorce: Appeal and Error.** A divorce case is tried de novo in

this court under the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than the other.

9. Divorce: Parent and Child. In a divorce case where the custody of minor children is involved the rule is that the custody of the children is to be determined by their best interests, with due regard for the superior rights of fit, proper, and suitable parents.
10. ———: ———. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person.
11. Divorce. The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property.
12. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Dawes County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

William A. Stewart and *Bevin B. Bump*, for appellant.

W. E. Mumby and *Stubbs & Metz*, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for divorce instituted by Gloria Ruth

Ivins, plaintiff and appellant, against James Rush Ivins, defendant and appellee. A trial was had to the court after which a decree was rendered granting a divorce to the defendant. Also custody of the two children of the parties was granted to the defendant. An attorney's fee, in addition to a previous fee of $400, was allowed to the plaintiff in the amount of $750. Also the plaintiff was awarded an automobile and a judgment in the amount of $145. Motion for new trial was duly filed by plaintiff. This motion was overruled. From that portion of the decree granting a divorce and custody of the children to the defendant the plaintiff has appealed. The defendant asserts in his brief that the appeal was taken from the order overruling the motion for new trial only, and not from the decree. This is an erroneous statement. The notice of appeal states that the appeal is "from the decision rendered herein, and from the order overruling the motion for new trial." From the portion allowing a fee for the attorney for plaintiff a cross-appeal has been taken by the defendant.

The plaintiff has set forth numerous assignments of error as grounds for reversal, but from the record it appears that but one question is presented for determination. The question is that of whether or not on the evidence contained in the record, and applicable law, the decree rendered has been sustained.

The other assignments relate to interim procedural rulings which have not come to this court in such manner as to permit of their review.

After these rulings were made the plaintiff, without reservation, answered over and the case was tried on its merits. This amounted to a waiver of objection to the rulings previously made. The controlling principle is the following: "Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives

error, if any, in such ruling." Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464.

It is urged that the court erred in rulings on objections to the testimony of Harley E. McWilliams which came into the record by deposition taken in California. Testimony of this witness is quoted in the statement of the case in the brief, however it is not pointed out in the argument what part or parts are claimed to be improper. This of course must be disregarded.

By the petition filed herein the plaintiff alleged, to the extent necessary to state here, that the parties were married on June 15, 1947; that the parties were residents of Crawford, Dawes County, Nebraska; that two sons were born of the marriage, one, Orville Rush Ivins, on February 10, 1950, and the other, James Joel Ivins, on August 5, 1952; and that the defendant had been guilty of extreme cruelty which amounted to grounds for divorce from the defendant. By the prayer of the petition she asked for a divorce, custody of the children, temporary and permanent alimony, support for the children, and costs of suit.

A detailed statement of the charges of cruelty against the defendant is not required here since on this appeal the question of the propriety of the denial of a decree of divorce to plaintiff is not presented. The question of whether or not a decree of divorce should have been granted to the defendant with custody of the children is the basic one here for consideration.

The defendant filed an answer to the petition in which, to the extent necessary to state here, he denied the charges of cruelty made against him by the plaintiff.

In addition to the answer he filed a cross-petition on the basis of which he prayed for a divorce, custody of the children, and that the plaintiff be denied alimony and attorney's fees. By the third paragraph of the cross-petition he charged that the plaintiff had been guilty of extreme cruelty toward him which entitled him to a divorce. The charges in this respect were in per-

tinent substance as follows: That plaintiff was guilty of extreme cruelty in that for several years she exhibited an abnormal tendency to be unduly familiar with other men; that she accompanied other men on secret trips in and around Crawford, Nebraska; that she accepted the attention of various men in the home of the parties during the absence of the defendant and at other places to the extent that her conduct in this respect has become a matter of common knowledge and repute; and that she has willfully failed and refused so to conduct herself as to promote a happy family life, all of which have destroyed the ends and objects of matrimony.

By the fourth paragraph of the cross-petition he charged that he had been informed and verily believed that plaintiff, during the past several years, had committed adultery with several men. The name of no man was set forth.

The plaintiff by appropriate pleading denied the allegations of cruelty and of adultery. In addition she pleaded that if she had been guilty of extreme cruelty it had been condoned.

Before proceeding to consider the evidence relating to the charges of cruelty made against the plaintiff, it is pointed out that any contention made that the charges, if proved, were condoned is on the record baseless. This is so because the record without controversy makes it clear that the defendant had no knowledge of any of the misdeeds charged against her until after the separation of the parties and the commencement of this action. It is also made clear by all witnesses including the defendant that the plaintiff took good care of the children and treated them properly and that it was not until after the action was instituted that the defendant concluded that she was not a proper person to be entrusted with their custody and control. As to this there is likewise no controversy.

To sustain the charges made against the plaintiff eight

witnesses were called by the defendant besides the defendant himself. Two of these gave no information of significance at all. They were John Kurtz and Gordon Moody.

One William Hudson testified that while in attendance at an affair at Crawford he and plaintiff sat in an automobile and engaged in what might be called an amorous interchange, but that no adulterous act was involved. This was admitted by plaintiff but she denied that she made any advances. His version was to the contrary. There were no witnesses to the incident.

Harold Hunt testified that one evening the plaintiff was sitting in her automobile when one Loy Pierce came along in another automobile. She sounded her automobile horn and drove away. His assumption was that she followed Pierce away.

Hope Reece testified that she saw Loy Pierce at the Ivins home many times, sometimes as often as three times a week. She said that on some of the occasions the defendant was also there.

Harold Glendy testified that on an occasion in 1955 at night when he and three other persons were returning home he observed a parked automobile which he passed. He identified two persons in the parked automobile as the plaintiff and Harley E. McWilliams. He said he saw the two rise up in the front seat. None of the other occupants of his automobile gave testimony on the trial.

On September 29, 1959, the deposition of Harley E. McWilliams was taken in Los Angeles, California. It was read in evidence at the trial. He lived in Crawford, Nebraska, and had known the parties to this case from 1946 to 1958. He had visited in their home and visited and associated with them socially. He testified that on occasions there was kissing and fondling between him and the plaintiff which extended over a period of between 1 and 2 years. His testimony indicates that he was the person in the automobile with plaintiff in

the incident described by Harold Glendy. He testified that on one occasion he went to the home of the plaintiff between 10 p.m. and midnight where he remained for several hours. He said that so far as he knew the Ivins children were in bed upstairs. He said that on that occasion, and on no other occasion, he had sexual intercourse with the plaintiff. He did not even approximately know the date. He said that as near as he could tell it was in the fall of 1956, in "their living room, or den, wherever they had a fire place." He gave no information the effect of which was to confirm his statement and none which could lead to the discovery of incidental facts the effect of which could lead to either confirmation or denial. Insofar as the record here is concerned the witness never disclosed this information to anyone until he disclosed it to the defendant when he called to see McWilliams in California in the summer of 1959.

The remaining witness is Lillie Sikorski, a married woman, who had lived in Crawford for 12 years. She came to the United States from Germany in 1947. She was married to Ralph Sikorski, a rancher, after coming to this country. At the time of the trial she was 53 years of age. She had been twice married and divorced before coming to this country. She became acquainted with the parties about 7 years before the trial. The homes of the two families were directly across the street from each other. For 5 years she cleaned house and did what is known as babysitting for the plaintiff and was often in the Ivins home. According to her testimony during all the time she was a close friend and confidant of the plaintiff. She also testified to certain incidents of social association away from the home. Without going into detail, she gave testimony of a number of amorous incidents between the plaintiff and Harley E. McWilliams and plaintiff and Loy Pierce. She also testified as to incidents whereby by telephone calls made by her and by the older son of the Ivins contacts

were arranged between the plaintiff and these men. She also testified to incidents when the plaintiff was alone with these men. She never however testified to any act or circumstance from which an inference could flow that an adulterous act had been committed as distinguished from mere opportunity. She gave much evidence such as has been characterized here but no good purpose would be served by setting forth its details herein. What has been reviewed, it is considered, sufficiently presents the basis for determination first of the question of whether or not the court erred in granting a decree on the ground of adultery, and if it did, whether or not on hearing de novo in this court a divorce should be granted to defendant on the ground of cruelty.

The rule as to the character of the hearing to be had here is that on appeal to this court in a divorce action the cause is tried de novo. See, Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Birth v. Birth, 165 Neb. 11, 84 N. W. 2d 204.

A general rule in the determination of whether or not a ground for divorce has been established is that acts asserted as grounds for divorce must be corroborated. Nuss v. Nuss, 148 Neb. 417, 27 N. W. 2d 624; Pestel v. Pestel, *supra;* Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368; O'Neill v. O'Neill, 164 Neb. 674, 83 N. W. 2d 92, 66 A. L. R. 2d 875; Goodman v. Goodman, 168 Neb. 841, 97 N. W. 2d 336.

Adultery, which is a ground for divorce, is a criminal offense the penalty for which is imprisonment in the county jail not exceeding 1 year. In the statutes as applied to a married woman it is defined as follows: "If (1) any married woman shall hereafter commit adultery, or desert her husband and live and cohabit with another man, * * * every person so offending shall upon conviction thereof be imprisoned in the county jail not exceeding one year." § 28-902, R. R. S. 1943.

It requires no citation of authority to say that before

one so charged criminally could be convicted of the offense the evidence would have to be sufficient to prove guilt beyond a reasonable doubt.

It is true that it has not been said that this same degree of proof is required where adultery has been charged as a ground for divorce. It has already been pointed out however that proof of an alleged ground of divorce must be corroborated. The cases already cited make it clear that the rule applies where the alleged ground is adultery. There is however no rule whereby to measure the amount of corroboration required but each case must be decided upon its own facts and circumstances. See, Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Roberts v. Roberts, 157 Neb. 163, 59 N. W. 2d 175; Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549.

The general rule as to the weight of evidence necessary to sustain a charge of adultery as a ground for divorce was stated as follows in James v. James, 29 Neb. 533, 45 N. W. 777: "The charge of adultery is a serious one, and it should be clearly established by competent testimony before a decree of divorce should be granted on that ground." See, also, Sewell v. Sewell, *supra*.

It is true that it is not necessary to show an overt act of adultery but the charge of adultery must be proved by evidence of such circumstances as will lead the mind of a just and reasonable person to the conclusion of guilt. Stackhouse v. Stackhouse, 88 Neb. 184, 129 N. W. 257; Cook v. Cook, 141 Neb. 294, 3 N. W. 2d 450.

The question of whether or not the plaintiff has been proved guilty of adultery by the weight of evidence exacted by these rules must depend for the most part by reference to the testimony of McWilliams and Sikorski, particularly as to content and credibility.

McWilliams testified to a single act. In this he said he participated. There was no fact or circumstance testified to by him which pointed to any other fact or

circumstance which could be regarded as corroboration. His testimony was so unrelated to any testimony of others as to time or incidents that the testimony of others could not be regarded as corroboration of his testimony. In addition to this, as he was the person who claims to have participated with the plaintiff in the act, his testimony was subject to caution and careful scrutiny.

This court said in Sewell v. Sewell, *supra:* "The voluntary testimony of an alleged paramour that he had intimate relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized." In the opinion in that case is contained a characterization of a man, and an appropriate attitude to be taken toward his testimony, who testifies that he has been guilty of conduct like that claimed by McWilliams in this case. That characterization will not be repeated here, but no reason becomes apparent why it should not be applicable to McWilliams.

In the light of these observations as to this testimony and the controlling legal rules it may not well be said that the charge of adultery with McWilliams has been sustained. It was in no wise corroborated.

Coming now to the testimony of the witness Sikorski, it is quite true that she testified, truthfully or falsely, to numerous incidents of indiscretion covering a period of years on the part of the plaintiff which were not comportable with a proper attitude toward harmony in her marriage relation. Her testimony however at no point referred to any act or condition or physical appearance of anything which was in proof of the commission of an act or acts of adultery as distinguished from suspicion. In addition to the things which she said that she observed she testified that on one occasion the plaintiff told her that she was afraid that she was pregnant by a man not her husband. All of the matters reflecting adversely upon the plaintiff were denied by her.

This witness breathed no word of all of this that she

claims as true to the defendant. She, according to her testimony, was a conspirator with plaintiff to bring about claimed indiscreet contacts of plaintiff with named men. She gave no information to anyone except to her husband. Whether she informed her husband before or after the commencement of this action is not made clear, but it is clear that it was not communicated to the defendant until after the action was commenced. The reason for the change of allegiance has not been made apparent by the record. Expediency is hinted in this instance as well as in the case of McWilliams, but there is nothing in the record to justify a safe conclusion that this was true. The very fact however that there was such a radical change of attitude of friendly allegiance must necessarily cast a cloud upon the veracity of the testimony given on the trial in this case.

The conclusion reached is that there has been a failure of sufficient proof to sustain the charge of adultery contained in the cross-petition. There is a failure of substantial corroboration of this charge.

As already pointed out an action for divorce is triable de novo in this court. Without restating what has already been said about the evidence relating to the conduct of the plaintiff and without elaborating thereon it may be said that if the trial court believed the testimony of the witnesses for the defendant it could have found that the plaintiff had been guilty of extreme cruelty which was sufficient to destroy the existing marriage relationship between the parties. It could have likewise found that there had been corroboration. It is obvious that the court did so believe.

Having heard the witnesses' testimony and having observed their demeanor it had the right to believe them. In Pestel v. Pestel, *supra,* this court said: "A divorce case is tried de novo in this court, under the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and

heard the witnesses and accepted one version of the facts over the other." See, also, Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208; Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871.

The conclusion reached therefore is that on the record presented a decree of divorce should be granted to the defendant from the plaintiff on the ground of extreme cruelty.

As to the custody of children this court in Gorsuch v. Gorsuch, on motion for rehearing, 143 Neb. 578, 11 N. W. 2d 456, said: "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents."

In application of the foregoing rule this court said in Speck v. Speck, 164 Neb. 506, 82 N. W. 2d 540: "In awarding the custody of minor children of tender years under the foregoing rule, the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person." See, also, Bath v. Bath, 150 Neb. 591, 35 N. W. 2d 509; Lichtenberg v. Lichtenberg, 154 Neb. 278, 47 N. W. 2d 575; Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300.

The evidence in this record stands undisputed, even by the defendant himself, that the plaintiff was regarded as a fit and proper person to have charge of and the care of the children of the parties at all times prior to the commencement of the action for divorce. Also there is an absence of evidence that thereafter she was guilty of any conduct which would render her unfit. The charge of unfitness made by the defendant was based solely on claimed information secured after the commencement of the divorce action. While it is of no controlling significance the children, as the record indicates, were by mutual agreement allowed to remain

with the plaintiff during the pendency of the case in the district court.

In the light of the disclosed facts and the controlling legal principles it appears that the custody of the children should be awarded to the plaintiff subject of course to the further order of the court if conditions should change.

Reasonably there should be an award to plaintiff for the support and maintenance of the children and also an award to plaintiff as alimony and division of property. The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property. See, § 42-318, R. R. S. 1943; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294. The fixing of the amount of alimony rests, in each case, within the sound discretion of the court. See Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919.

This court said in Kinch v. Kinch, 168 Neb. 110, 95 N. W. 2d 319: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just."

Facts not disclosed by the record make difficult the solution of the problem of what would be a proper award of alimony and division of property and of support for the children. There is information as to the value of the property of the defendant but there is nothing authentic as to how or when it was accumulated.

An appraisal appearing in the record discloses that the value of the property at the time of trial was $164,725. Other information discloses that in 1957 he had salaries and bonuses amounting to $10,560. In 1958 his salaries were $11,300 and in 1959 they were $13,800. Also it is disclosed that in 1958 he received as bonuses and dividends $4,260 and in 1959, $13,065 from like sources.

It appears from this that as a minimum, even though it should be true that none of the property was accumulated during the married life of the parties, in view of the award of custody of the children to the plaintiff, the plaintiff should receive as alimony and distribution of property, $25,000. It also appears that an award for child support should be made in the amount of $300 a month until the older child shall attain his majority and then continue in the amount of $150 a month until the younger shall attain his majority. This award of child support should of course be subject to the further order of the court in the event of changed conditions.

Since by this opinion the decree on the ground of adultery is not being allowed to stand the award of an attorney's fee by the district court for plaintiff's attorney was not improper. There is nothing to indicate that under the circumstances it was excessive. The cross-appeal in relation thereto may not be sustained.

The decree granting the defendant a divorce on the ground of adultery and awarding him the custody of the children is reversed. That portion of the decree awarding the plaintiff the automobile, $145, and the attorney's fee of $750 is affirmed. This attorney's fee of $750 was in addition to a temporary fee which was allowed. The allowance of the temporary fee is also

affirmed. The cause is remanded to the district court with directions to render decree granting the defendant a divorce on the ground of extreme cruelty; awarding the custody of the children of the parties to the plaintiff; and requiring the defendant to pay to her for their support and maintenance $300 a month until the older shall attain his majority, and thereafter $150 a month until the other shall attain his majority, subject to the further order of the court. As to custody the defendant shall have the right to visit the children at all reasonable times and the defendant shall have the right to have the children visit and be with him over reasonable periods of time when it will not interfere with their education. If agreement may not be reached in this matter either party may submit the matter for determination to the district court. It shall be adjudged that the defendant pay to plaintiff as alimony and division of property $25,000, of which $5,000 shall be due and payable on issuance of mandate herein, and the balance shall become payable in the amount of $5,000 annually thereafter until the total amount shall have been paid. The plaintiff is awarded for the services of her attorney in this court a fee in the amount of $750.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., not participating.

JOHN H. FREY, APPELLANT AND CROSS-APPELLEE, V. ALBERT P. HAUKE, APPELLEE AND CROSS-APPELLANT.
108 N. W. 2d 228

Filed March 17, 1961. No. 34873.

1. **Judgments.** When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties.
2. **Partnership.** The burden of proof is upon the plaintiff to prove

an oral contract of partnership for a fixed term by clear, satisfactory, and unequivocal evidence.

3. ———. The fact that a partnership incurred debts and charged its assets for their payment is no proof of an agreement that the partnership shall continue until its debts are paid, for those debts may be paid as well after as before dissolution.
4. ———. A managing partner who acquiesces in the matter of the depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation.
5. ———. If a partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in the profits earned.
6. ———. The good will of a partnership consists of every possible advantage acquired by it in carrying on its business.
7. ———. The chief elements of value in partnership good will are continuity of name, place, and organization.
8. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Wright & Simmons, James R. Hancock, and *Robert M. Harris,* for appellant.

Lyman & Winner and *Stubbs & Metz,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought by John H. Frey as plaintiff in the district court for Scotts Bluff County, against Albert P. Hauke, defendant, for an accounting between the respective parties as partners, and for damages for the breach of a partnership agreement entered into by them.

We set forth certain findings of the trial court perti-

nent to this appeal: The decision in the case of Hauke v. Frey, 167 Neb. 398, 93 N. W. 2d 183, was the law in this action, and the statement appearing therein, as follows: "* * * indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place" was binding upon the trial court; that a partnership for a definite term or particular undertaking as described in paragraph 1 (b) of section 67-331, R. R. S. 1943, existed between the parties prior to March 14, 1957; that the partnership was not a partnership at will at the time of its commencement; that the partnership became a partnership at will on March 14, 1957, by reason of a writing designated exhibit No. 25; that the partnership being a partnership at will on March 19, 1957, the defendant had a right to terminate the same, and plaintiff was not entitled to damages for the wrongful termination thereof; that the depreciation figure used in the accounting procedure of the firm's accountant was proper; that prior to the dissolution of the partnership the profits of the same were $5,722.92, one-half of which or $2,861.46, was awarded to the plaintiff; that the good will of the partnership at the time of dissolution was valued at $10,000, one-half of which or $5,000 was awarded to the plaintiff; that the income and expense statements prepared by the accountant for the partnership, shown by exhibits, accurately represented the income and expense of the partnership from September 1, 1956, through March 31, 1957; that the obligation of the plaintiff on the conditional sales contract should thereafter be defendant's separate obligation and plaintiff held harmless from this and all other obligations of the partnership; that the plaintiff drew no salary for that part of March 1957 prior to March 19, 1957, and was entitled to 19/31 of $425, or $260.49 for the period from March 1 to March 19, 1957; and that the plaintiff was entitled to interest at the rate of 6 percent per annum from March 19, 1957, on all sums found due on that date. In all, the trial court

awarded the plaintiff $8,241.95 plus interest at 6 percent per annum from March 19, 1957, until paid, and taxed the costs to the defendant.

The plaintiff filed a motion for new trial; the defendant filed a motion for new trial; and the trial court overruled both of these motions. The plaintiff perfected appeal to this court.

The plaintiff's petition alleged in substance that on or about March 27, 1956, he and the defendant orally entered into a partnership agreement for the construction, purchase, and operation of equipment for a bowling alley to be housed in a building to be built by the defendant and owned by him; that the defendant was to advance the funds necessary for the commencement of the business; that the plaintiff was to manage the business and receive a salary of $425 a month; that the defendant was to receive $500 a month for the rent of the building; and that each party was to share evenly in the partnership assets, that is, the profits, and in the same degree as to the losses. The petition further alleged that the agreed life of the partnership was the life of the parties; that the business was established in conformity with the oral agreement between the parties; that the parties individually and as partners executed notes and other instruments obligating them to pay large sums of money in behalf of the business; that the partnership agreement was complied with in all respects until March 19, 1957; that since March 19, 1957, the defendant has had exclusive possession of the business, dealt with it as his own, received the profits, failed to account to the plaintiff, and had therefore breached the partnership agreement; and that the defendant wrongfully dissolved the partnership and converted the partnership property to his own use and deprived the plaintiff of expected profits and salary during the life of the partnership, to the plaintiff's damage.

The defendant's amended answer denied the allegations of the plaintiff's petition except those specifically

admitted, and alleged that any partnership agreement between the parties was dissolved and terminated not later than March 14, 1957; that no profit was made from the partnership business prior to that date; that any agreement for the partnership did not fix any term for the continuance of the same; that it was a partnership at will; that the plaintiff did not contribute any capital to the business; and that insofar as any personal obligations the plaintiff had assumed relating thereto, if any, the defendant offered to hold the plaintiff harmless with respect thereto.

The plaintiff's reply to the defendant's amended answer alleged certain facts in addition to those set forth in his petition, and prayed for an accounting for the period of time from the commencement of the partnership business to and including the date of any decree that might be entered and the time thereafter during which such matter might be pending upon appeal until a full accounting was made; for damages for breach of the partnership agreement; and for such other relief as may be just and equitable.

The plaintiff set forth numerous assignments of error. We will hereinafter discuss those deemed pertinent to a determination of this appeal.

The plaintiff testified that he and the defendant talked about going into the bowling alley business together on different occasions, and discussed how much cash it would take to get into the business and the length of the finance plan with reference to purchasing equipment. The plaintiff further testified that he and the defendant went to Denver to talk to the Brunswick-Balke-Collender people, hereafter referred to as the Brunswick Company, about going into the bowling alley business; that on March 27, 1956, he and the defendant ordered bowling alley equipment, and both of them signed the order as partners. This order was later modified. He further testified that he and the defendant had an oral agreement that the defendant was to re-

ceive $500 a month for the rental of a building; that the plaintiff was to receive $425 a month as salary for managing the business; that the Brunswick Company was to be paid for the bowling equipment out of the proceeds of the business; and that after the Brunswick equipment was paid for there would be money available to reinvest in other bowling equipment and expand the business which both the plaintiff and defendant agreed could occur. No length of time was specified as to how long the plaintiff was to manage the business. It was agreed that the business would be called the Bowl Arena. The building was to be constructed to accommodate 12 bowling alleys. An order was signed for 10 bowling alleys.

The plaintiff had an agreement with Terry Carpenter reciting that Carpenter would not start in the bowling alley business, and that the plaintiff would not sell any alcoholic liquor or beer in Terrytown.

The defendant owned lots near Terrytown, between Scottsbluff and Gering, which were in a suitable location for a bowling alley and upon which the building was to be constructed. The defendant hired a contractor to build the building. The defendant used his own funds to pay for the construction of the building. The business was commenced on August 31, 1956. The plaintiff acted as manager, kept the daily records, and advised the firm's accountant with respect to keeping the books. The plaintiff, by his promotion of the business, succeeded in establishing 96 bowling teams in 7 leagues, and arranged for 30 or 35 weeks of bowling. These teams bowled on an average of once a week, except on certain holidays. There was also open bowling, which was distinct from the leagues.

On March 14, 1957, the plaintiff wrote a letter to the defendant in which the plaintiff said that he and the defendant could not continue business together any longer and that the only alternative would be for the plaintiff to buy out the defendant, the defendant to buy out the plaintiff, or the two find someone to buy

out both of them. The plaintiff then made certain proposals to the defendant with respect to the defendant buying the plaintiff out and with respect to the plaintiff buying the defendant out. In this letter the plaintiff stated that his offer would be in effect only until March 16, 1957, since the defendant had fixed a time limit for the plaintiff to decide what he wished to do.

There is an exhibit in evidence which shows the conditions under which the defendant would continue with the business venture, primarily by the formation of a corporation with the assets of the business to be the property of the corporation, a stock purchasing agreement, and other matters relating to the business and the corporation, if formed.

On March 18, 1957, the plaintiff's managership of the business was terminated by a letter to the plaintiff by the defendant.

On March 19, 1957, Hauke filed a petition in the district court for Scotts Bluff County, seeking to enjoin Frey from participation in the business. A temporary restraining order was granted. Frey filed an answer and cross-petition. The district court decided that injunction should not be granted, and dissolved the restraining order. Hauke appealed to this court, and the judgment of the district court was affirmed. See Hauke v. Frey, *supra*.

With reference to the value of the business on March 19, 1957, the plaintiff testified that prior to opening the business the defendant advanced a downpayment for the bowling alley equipment, fountain equipment, and furniture and equipment in a total amount of $22,943.94, $15,500 of which was a downpayment for the bowling equipment with the Brunswick Company. The contribution of the plaintiff to the partnership amounted to $120.60, which the trial court ordered returned to the plaintiff. The plaintiff also secured the contract of noncompetition from Terry Carpenter, which he stated had value. Just how much value is not determinable from

the record. The plaintiff and defendant contracted to pay $42,814.98 in installments on the bowling equipment.

Considering all of the factors, such as the value of the equipment in place, location of the business, the number of alleys with relation to the population, the fact that the building was built for a bowling alley, that the landlord had an interest in the business providing a favorable rent price for the bowling alleys, the potentiality of the business over the years, the fact that the building was heated and had air-conditioning facilities, also that there was adequate parking, and that the business was located outside of the city limits creating a favorable tax situation, the expected life of the bowling equipment, but not excluding the unpaid balance on the conditional sales contract, the value of the business in the plaintiff's opinion was $92,000.

The defendant testified that the value of the business on March 17, 1957, was $23,000, that was what he had in it, and it would have no other value.

In August 1958, the defendant installed automatic pinsetters. Prior to this installment there were semi-automatic pinsetters installed, model B-10, which were traded in on the new equipment. The total price of the new equipment was $119,958.84. The total down-payment was $9,666. The time balance owed was $110,-292.84. This order was made by the defendant with the Brunswick Company, and he alone signed the order.

An expert testified that the bowling league season starts in September and continues to be good into April of each year; that this type of business has increased greatly in the last few years; that there are very few bowling alley failures; that he knew of no repossessed bowling alleys; and that with reasonable maintenance all of the equipment that was purchased by the plaintiff and defendant, with the exception of the bowling pins, would have a life of about 30 years. This witness further testified that a profit of from 17 to 25 percent on the investment would be expected with a well-managed

bowling alley; and that in any community where the population ratio is one alley to every thousand people or more, the business would be good.

The record shows that in addition to the 10 alleys owned by the parties, there were 8 other alleys in the community, and that the population of the trade area was estimated at 80,000 people.

We have examined the exhibits relating to the amount of business transacted when the plaintiff was manager of the business and when others managed the business after the plaintiff ceased to do so. In addition we have examined all of the exhibits that in any way pertain to the business as to its gross business in the years stated in such exhibits, the net return of the business, and the expenses relative thereto. It would serve no useful purpose to set out these figures.

The defendant testified that he never discussed with the plaintiff what would be invested by either him or the plaintiff, or the respective interests that each would have in the business before they went to Denver; that while they were in Denver he made a downpayment on the bowling equipment; that the plaintiff had no money to make a downpayment; that after he returned from Denver he and the plaintiff endeavored to raise some money, without success; and that the defendant borrowed money on his life insurance, from the bank, and from his personal account in a drugstore business, in the amount of $70,000. He further testified that the construction of the building started about May 1, 1956; that he had no conversation with the plaintiff as to how long the business would continue; that after the building was constructed, up to the time of trial, he never had any conversation with the plaintiff with reference to the continuation of the business; that he never had a conversation with the plaintiff as to the profits of the business paying for the Brunswick Company equipment; and that a salesman connected with the equipment company in a conversation with the plain-

tiff and defendant when they were looking over a bowling alley establishment in Golden, Colorado, indicated the possibility of making payments on the equipment from the profits of the business.

On cross-examination the defendant testified that he tried to agree with the plaintiff, but they could not arrive at any agreement. However, he and the plaintiff did agree on the amount of rent, the name of the business, the plaintiff's salary, and that the plaintiff was to manage the business.

There is testimony in the record to the effect that every 10 years the Brunswick Company comes out with a new line of equipment used for modernizing the bowling alley business. This did not mean that all of the items were worn out, just that they would be out of style. The losses because of depreciation of equipment used would be on a 10-year basis.

Another witness who handled bowling alleys for resale testified that from past experience certain items will be changed, not periodically but probably within a 10-year period; and that all accessory items will be changed, such as ball returns, seating arrangements, scoring tables or Tell-A-Scores, that is, the styles would be changed, but not so much the basic use of the items.

An accountant employed by Gustafson, the head of an accounting firm, set up the books of the partnership. This witness testified that the books were set up with all equipment at a 10 percent depreciation rate for federal income tax purposes; and that he was not requested to use that rate of depreciation by either the plaintiff or defendant.

An accountant for the defendant, who prepared exhibits for the defendant in this trial, testified that he set up the defendant's books for the Bowl Arena on a 10 percent depreciation basis without any direction from anyone. The reason for doing so was that such depreciation would be acceptable to the Internal Revenue

Service as a method of depreciation for income tax purposes.

In Hauke v. Frey, *supra,* this court said: "It was, under the evidence, the intention of the parties to convert the relationship into a corporation but this they were apparently never able to accomplish. * * *

"The conclusion reached is that there was a partnership although there is not in evidence an agreement containing either complete details of organization or of functions after organization. This court said in Bard v. Hanson, 159 Neb. 563, 68 N. W. 2d 134: 'The scope of a partnership may be evidenced by written or oral agreement, or implied from the conduct of the parties and what was done by them.' The acts of the parties and what was done, as disclosed by the testimony of plaintiff, indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place.

"This being a partnership the plaintiff could not by injunction deprive the defendant of his possession of the partnership property and his rights in the management of the partnership business.

"Section 67-318 (e), R. R. S. 1943, provides: 'All partners have equal rights in the management and conduct of the partnership business.'

"The general rule is that one partner may not maintain an action against his copartner on account of a partnership transaction where there has been no settlement of the partnership accounts and business. See, Sanley v. Davies, 113 Neb. 614, 204 N. W. 385; Mullikin v. Pedersen, 161 Neb. 22, 71 N. W. 2d 485."

When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties. See, Gilcrist v. Wright, 169 Neb. 799, 101 N. W. 2d 158; Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108; Niklaus v. Phoenix Indemnity Co., 166 Neb. 438, 89 N. W. 2d 258.

We believe that this court's opinion in Hauke v. Frey, *supra,* is clear in that it held that there was a partnership existing between the plaintiff Hauke and the defendant Frey; that injunction would not prevail as against the defendant Frey; and that it was the intent of the parties to form a corporation. These are facts which cannot be relitigated.

The plaintiff contends that the defendant has taken the plaintiff's share of the business originated by him and a substantial income expected from such business for the rest of his life; further, that the amounts awarded to plaintiff by the trial court were substantially less than the damage actually sustained by the plaintiff; and that the definite term of the partnership terminated not earlier than May 15, 1961, the date of the last payment due the Brunswick Company on the conditional sales agreement for the purchase of the bowling alley equipment.

We have heretofore made reference to exhibit No. 25, a letter dated March 14, 1957, written by the plaintiff to the defendant. The trial court found that exhibit No. 25 was not admissible as an admission against interest so far as the values set forth therein, it being an offer in compromise, but that exhibit No. 25 was admissible to show that the plaintiff, by writing the letter to the defendant, terminated the "definite term or particular undertaking" as that term is used in section 67-331 (1) (b), R. R. S. 1943, and the term for which the partnership was to have existed became a partnership at will by reason of the writing contained in exhibit No. 25.

The burden of proof of showing a partnership for a fixed term is placed on the plaintiff in this case. The question presented is, has the plaintiff proved an oral contract, the terms of which are clear, satisfactory, and unequivocal when all of its parts and the elements of the contract are taken into consideration? See Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525.

The plaintiff's testimony is to the effect that he had an oral agreement with the defendant to pay for the bowling alley equipment out of the profits of the business. The defendant denied that there was any such agreement, but stated that he hoped that the profits of the business would pay for such equipment, and that the partnership would continue for the life of the parties.

In Owen v. Cohen, 19 Cal. 2d 147, 119 P. 2d 713, it appears that on January 2, 1940, the plaintiff and defendant entered into an oral agreement whereby they became partners in the operation of a bowling alley. The partners did not expressly fix any definite period of time for the undertaking. For the purpose of securing necessary equipment, the plaintiff advanced $6,986.63 to the partnership, with the understanding that the amount so contributed was to be considered a loan to the partnership and was to be repaid to the plaintiff out of the prospective profits of the business as soon as it could reasonably do so. Differences arose between the parties with regard to the management of the partnership affairs and their respective rights and duties under the agreement. The business opened on March 15, 1940. The action was instituted June 28, 1940. The purpose of the action was for a dissolution of the partnership and sale of its assets. The court found that the partners did not agree upon any definite term for the continuance of said partnership, nor upon any particular undertaking to be accomplished, consequently there was a partnership at will, and concluded that the plaintiff had a right to a dissolution of the partnership.

In Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. N. S. 471, the court said that the mere fact that a firm has incurred debts and charged its assets for their payment is no proof of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before dissolution.

The testimony of the plaintiff is to the effect that no definite length of time, within his recollection, for the

partnership to continue was ever decided. It appears from the record that the plaintiff and defendant agreed that there was no express agreement as to a fixed time for the partnership to continue. The contract with the Brunswick Company made no requirement relating to the profits to pay for the equipment furnished. This contract provided for the payments to be completed in a period of 5 years. This fact, standing alone, would be insufficient to establish a partnership agreement for a fixed term. This would be true in view of Hauke v. Frey, *supra,* wherein the court said the acts of the parties "indicated a partnership which was to continue until plans could be worked out and a corporation organized to take its place."

In the light of the record and what has been said above, it is apparent that the parties never intended the partnership for a fixed period of time. What they really intended to do was to create a corporation. They failed in this idea as indicated in Hauke v. Frey, *supra,* which is the law of the case on this phase of it.

We believe that exhibit No. 25, part of which is heretofore mentioned, was admissible in evidence for the purpose for which the trial court admitted it. In any event, the evidence discloses that the partnership was a partnership at will, and the trial court was correct in so finding.

The plaintiff contends that he should not be bound by the book-rate depreciation as testified to by the two accountants; and that the market value of the business must be used instead of the book value to determine his interest in the partnership. Several cases are cited touching upon this proposition by both the plaintiff and defendant which we deem unnecessary to discuss. In the instant case, as we view the evidence, the plaintiff made no complaint as to how the partnership books were set up. The defendant gave Schaaf no instructions relating to the books or in what manner they should be kept. The plaintiff had access to the books at all times

until the dissolution of the partnership when they were taken over by the defendant, and was the sole manager of the business.

As stated in 40 Am. Jur., Partnership, § 323, p. 356: "One of the ordinary duties of partners is to keep true and correct books showing the firm accounts, such books being at all times open to the inspection of all the members of the firm. This duty primarily rests on the managing or active partner, and he cannot defeat the rights of his copartner to a settlement and a proper distribution of the assets by failing to keep his accounts."

The plaintiff, as manager of the business, had every opportunity to change the manner of keeping the firm books if he desired to do so. Suffice it is to say that in any event the evidence discloses that the plaintiff in fact acquiesced in the manner of keeping the partnership books. There is no merit to the plaintiff's contention as above set forth.

There are many authorities relating to the right of a partner to share in the profits after the dissolution of the partnership. With reference to the plaintiff's right to do so, we believe the following to be applicable.

In 40 Am. Jur., Partnership, § 390, p. 398, it is said: "The right of a partner to share in the profits earned by the continuation of a partnership business after the dissolution of the firm is founded upon the use to which such partner's interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned."

The plaintiff contends that the trial court erred in fixing the amount of the good will of the partnership business. The following are applicable to this proposition.

In Adams v. Adams, 156 Neb. 540, 57 N. W. 2d 131, this court said: "There is no known invariable rule

for the ascertainment of intangible or good will value. 38 C. J. S., Good Will, § 6, p. 953. There are however certain factors which must be regarded in order to arrive at a valuation. 38 C. J. S., Good Will, § 6, p. 953; 68 C. J. S., Partnership, § 396, p. 910."

In 38 C. J. S., Good Will, § 6, p. 954, it is said: "A principle applied in some cases is that the valuation of good will may be fairly arrived at by multiplying the average net profits for a period of years by a number of years, such number being suitable and proper, having reference to the nature and character of the particular business under consideration. Three factors have been said to enter into net profits: (1) Interest on the capital; (2) personal services of the party; and (3) the good will of the concern."

In 68 C. J. S., Partnership, § 69, p. 501, it is said: "The good will of a partnership has been defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises or name or other matter. Included in the good will of a partnership is the right to use the established firm name. It has been said that the chief elements of value in partnership good will are continuity of name, place, and organization."

Taking into consideration the nature of the business, the promotion thereof by the plaintiff which resulted in a substantial business, and the factors relating to good will of the business, we conclude that the trial court did not err in finding that $10,000 was the value of the good will of this business.

The defendant's brief contains a cross-appeal contending that the trial court erred by overvaluing the good will of the business at $10,000 and by awarding half of the value of the good will that had inured to the business to the plaintiff. We conclude that the cross-appeal should be dismissed.

"Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evi-

dence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite." Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

The plaintiff raised other assignments of error which we deem unnecessary to discuss in view of what has heretofore been stated.

The costs of this appeal shall be taxed to the plaintiff.

For the reasons given in this opinion we affirm the judgment of the trial court.

AFFIRMED.

WENKE, J., not participating.

EDWARD SEKORA, APPELLEE, V. LEROY MANGERS, APPELLANT.
108 N. W. 2d 240

Filed March 17, 1961. No. 34898.

1. **Automobiles: Trial.** Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence.
2. ———: ———. Before a verdict can be properly directed in such a case the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury.
3. **Automobiles.** The lawfulness of the speed of an automobile within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
4. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.

APPEAL from the district court for Nuckolls County: STANLEY BARTOS, JUDGE. *Affirmed.*

Stiner & Boslaugh, for appellant.

W. E. Garrison, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, and SPENCER, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Nuckolls County by Edward Sekora, plaintiff, against LeRoy Mangers, defendant, to recover damages for personal injuries sustained by the plaintiff and property damage to his automobile due to the negligence of the defendant in a collision between the defendant's automobile and the plaintiff's automobile. The case was submitted to a jury, resulting in a verdict in favor of the plaintiff in the amount of $3,500. The defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. This motion was overruled. From the overruling thereof, the defendant appeals to this court.

The plaintiff's petition alleged in substance that on September 19, 1958, the plaintiff was driving his automobile in a northerly direction on the east side of State Highway No. 14, hereafter referred to as highway 14, and the defendant was driving his automobile in the same direction at a point 6 miles north of Nelson; and that the defendant ran into the rear end of the plaintiff's automobile causing damage to the plaintiff's automobile and injuries to the plaintiff. The plaintiff further alleged that the defendant was negligent in the operation of his automobile in the following particulars: (1) In operating his automobile at a rate of speed such as to endanger the safety of others lawfully upon said highway; (2) in failing to apply his brakes in time to avoid colliding with the rear of plaintiff's automobile; and (3) in failing to have his automobile under proper con-

trol as he approached the plaintiff's automobile when by the exercise of ordinary care on his part he knew or should have known he was liable to collide with the plaintiff's automobile. The plaintiff prayed for damages for personal injuries and for property damage to his automobile.

The defendant's answer to the plaintiff's petition denied every allegation therein except those admitted, and alleged an affirmative defense charging that the plaintiff was negligent in the operation of his automobile in the following particulars: (1) That the plaintiff entered highway 14 from the west traveling on State Highway No. 4, hereafter referred to as highway 4, at a time when he could have seen the defendant's automobile approaching on highway 14 from the south and he failed to look and see said approaching automobile; (2) that he failed to yield the right-of-way to the defendant who approached him from the right; (3) that he failed to stop or apply his brakes and thereby avoid said collision; (4) that he failed to have his automobile under proper control in approaching the intersection; (5) that he drove his automobile directly into the path of the defendant's automobile approaching and reaching said intersection from the south at approximately the same time when it was dangerous to all concerned to do so; (6) that he was traveling less than 10 miles an hour as he approached said intersection, thereby giving the defendant reason to believe that he would stop before entering the intersection; and (7) that he failed in approaching said intersection from the west to keep in the right lane of traffic on highway 4 and he failed in turning to the left to pass beyond the center of the intersection of said two highways as required by law. The defendant in his cross-petition prayed for property damage to his automobile.

The plaintiff's reply to the answer of the defendant was a general denial of the allegations therein, except those admitted in plaintiff's petition. Plaintiff's answer

to the defendant's cross-petition was in effect a general denial of the affirmative defense alleged therein.

The defendant assigns as error that the trial court erred in failing to sustain the motions of the defendant for a directed verdict made at the close of the plaintiff's case-in-chief and renewed at the conclusion of all of the evidence; and in failing to sustain the defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

Section 39-7,109, R. R. S. 1943, provides in part: "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, specifications, and special rules hereinafter stated: (a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle; * * *."

Section 39-7,108, R. R. S. 1943, provides in part: "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. * * * (3) The following speeds shall be prima facie lawful, but in any case when such speed would be unsafe, they shall not be lawful: * * * (c) sixty-five miles per hour between the hours of sunrise and sunset and fifty-five miles per hour between the hours of sunset and sunrise upon any * * * highway that is a part of the state highway system outside of a city or village; * * *. (4) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, * * * and speed shall be decreased as may be necessary to avoid colliding with any * * * vehicle * * * on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

Section 39-728, R. R. S. 1943, provides: "Motor vehicles traveling upon public highways shall give the

right-of-way to vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left when said vehicles shall reach the intersection at approximately the same time. In all other cases the vehicle reaching the intersection first shall have the right-of-way."

Section 39-741, R. R. S. 1943, provides in part: "(7) Intersection shall mean the area embraced within the prolongation of the lateral curb lines or, if none, then the lateral boundary lines of two or more highways which join one another at an angle, whether or not one such highway crosses the other; * * *."

The foregoing provisions of the statutes relate to this appeal.

The record shows that this accident occurred about 4:15 p.m., on September 19, 1958. The day was clear and the pavement dry. The plaintiff was driving a 1952 Ford Tudor which was 5 feet 8 inches wide and 16 feet long. The defendant drove a 1957 Ford Vanette which was of ordinary car length but about 8 feet high and a little wider than the average automobile. It was a walk-in van about 17 feet long which weighed about 5,000 pounds and carried a cargo load of potato chips, Fritos, and rice weighing about 1,000 pounds.

The plaintiff testified that he was a farmer, 39 years of age, who for 3 years had lived a quarter of a mile north of the intersection where the accident occurred. At the time of the accident he had his five children with him. Their ages ranged from 2½ years to 10 years. He had picked up his children at school, and the accident occurred on his way home.

The defendant was 25 years of age at the time of the trial and was a route driver for a concern that sold snack products. He was alone in his automobile.

Highways 4 and 14 constitute a junction where the two highways join. Highway 4 runs east and west and highway 14 runs north and south. Highway 14 is surfaced with blacktop. Highway 4 extends west from

highway 14 and is graveled except for the area extending about 200 feet west of highway 14 which is blacktopped. As highway 4 approaches highway 14 from the west, it becomes wider from its normal width of 30 feet to a width of 346 feet when it joins highway 14. There is an embankment on the south side of highway 4 extending from the point where the blacktop on highway 4 joins the gravel at a point about 200 feet west of the midline of highway 14 to a point 57 feet west of the midline of highway 14. A driver proceeding east on highway 4, approaching highway 14, would be unable to see traffic approaching from the south on highway 14 in the area where this embankment is located on the south side of highway 4. After reaching a point 57 feet west of the midline of highway 14, a driver of an automobile would be able to see south to the crest of a hill on highway 14 which slopes down to the intersection. The crest of the hill is 1,600 feet south of the midline of highway 4.

At the time the accident occurred, there was a mailbox on the east side of highway 14, 57.3 feet north of the midline of highway 4, and a highway sign on the east side of highway 14, 219 feet north of the midline of highway 4. There are no stop signs at the intersection, nor signs governing the speed of automobile drivers on highway 14 approaching the intersection from the south.

The plaintiff testified that he entered the intersection in the area of the mailbox, which has now been removed, at a speed of 20 to 30 miles an hour as he entered highway 14; that prior to entering highway 14, he looked to the north and to the south and did not see any automobiles on highway 14; that he then entered highway 14; and that he heard a horn blow, then his automobile was struck in the rear part by the front end of the defendant's automobile. The only car he saw after entering highway 14 was the defendant's automobile. The plaintiff did not apply his brakes because he was afraid if he stopped his automobile suddenly

the defendant's automobile would hit his automobile again, and he just coasted to the north on highway 14. He then backed his automobile up, stopped, and got out of it. The defendant was getting out of his automobile. The plaintiff further testified that the defendant's automobile struck all of the right rear half of his automobile and a part of the left rear half of it; that the defendant's automobile, after the impact, was still on the highway off to the right of the blacktop; that he had a conversation with the defendant and it was decided that someone in authority should investigate the accident; and that the defendant told the plaintiff that he thought the speed of his automobile was 65 miles an hour. The plaintiff further testified that his automobile was in its proper lane going north on highway 14 when it was struck; that each lane of highway 14 is about 12 feet in width; and that the defendant said something about going around to the left side of the plaintiff's automobile to pass, but the defendant thought the ditch was too deep at that point, then he thought about going to the right to pass the plaintiff's automobile, and then struck the plaintiff's automobile. The defendant said that he had a load of boxes in his automobile which made his load rather topheavy. The plaintiff was familiar with this corner and with the intersection. He testified that he was traveling about 35 miles an hour as he approached the intersection, and reduced his speed to between 20 and 30 miles an hour as he entered the intersection; that he did not stop his automobile but had made his turn into the intersection and was driving north on his right side of highway 14 when the accident occurred; that he saw the defendant driving north toward him by looking into his rearview mirror, and the defendant's automobile looked very close to him when he heard the horn; that as he entered highway 14, there was 57 feet where he could see anybody coming from the south; that he looked to the south within that 57-foot area and could see to the south 1,600 feet; that he

had traveled 200 feet from the center of the intersection when the accident occurred; and that he finally got his speed up to 35 miles an hour. The plaintiff further testified that the damage to his automobile was in the amount of $518.37. There is also testimony in the record relating to injuries received by the plaintiff as a result of the accident.

The defendant testified that on the day of the accident he was going north on highway 14; that he was familiar with the intersection of highways 4 and 14; that he was traveling at a rate of speed of 55 miles an hour; and that as he proceeded north he saw the plaintiff's automobile coming from the west slowly cutting north at about 15 miles an hour. The defendant slowed down as he came to the intersection, believing the plaintiff would stop his automobile. At that time the front end of the defendant's automobile was touching the center of the intersection or very close to the center of the intersection. The defendant testified that he applied his brakes hard, but that they probably did not make any skidmarks until his automobile had proceeded north a ways because his automobile did not skid easily; that when he first realized that the plaintiff's automobile was coming in front of him, he could not go around it because the plaintiff was cutting across the intersection into highway 14, and when the plaintiff got across the centerline of the highway there was no time for him to pass the plaintiff's automobile; that he did not believe he could avoid the accident by turning his automobile to the right; and that when he got to the place at about the center of the intersection he could see the plaintiff, but he did not believe the plaintiff looked to see him, as the plaintiff was looking the other way. The defendant further testified that he was in his right lane going north, and the plaintiff's automobile was in the right lane going north on highway 14 when the collision occurred; that the defendant at that time was traveling at a rate of speed of 35 miles an hour; and that the

plaintiff and defendant talked after the collision, and the defendant thought he had made a statement that his automobile was traveling at 55 miles an hour. The defendant testified that the damage to his automobile was in the amount of $60.50.

On cross-examination the defendant testified that at a point 173 feet south of the center of the intersection he could see the plaintiff's automobile, and this automobile was within his vision until the time of the impact; that the plaintiff's automobile was ready to enter the intersection when he first saw it; that the plaintiff never got his automobile completely straightened out until the defendant was pretty close behind him; and that the plaintiff did not make a "square" turn but "rounded the corner." This witness further testified that it was at least 219 feet north of the centerline of the intersection where the impact occurred and that he kept the brakes on his automobile applied for a distance of 219 feet; and that the impact occurred 44 feet north of the end of the intersection.

On re-cross-examination the defendant testified that the plaintiff's automobile was in the intersection of highways 4 and 14 before the automobile of the defendant started to approach the intersection.

A deputy sheriff testified that he was called to the scene of the accident. The plaintiff and defendant were there when he arrived. He took certain measurements. He established a point to measure from, which was the mailbox 57.3 feet north of the midline of the intersection. He measured from that point north 132 feet, and at that point the defendant's automobile made skidmarks, or black marks, for a distance of 38 feet, so by his measurements the point of impact was 170 feet from the mailbox. He further testified that the black marks were out of the intersection; that the intersection had a "rounding corner" to the north from the west; that it was about 44 feet north of the end and out of the intersection where the impact occurred; and that

the point of impact was on the right side of highway 14 going north.

On cross-examination this witness testified that the corner where highway 4 intersects with highway 14 is a big, wide corner; that he filed a report to the effect that the defendant's automobile traveled 132 feet north from the mailbox; that the defendant applied his brakes but hit the plaintiff's automobile; that the plaintiff failed to see the defendant's automobile coming north on highway 14 and pulled out in front of the defendant's automobile; and that the defendant was unable to stop his automobile, and hit the rear end of the plaintiff's automobile. On redirect examination this witness testified that the statement that plaintiff's automobile pulled out in front of the defendant's automobile was his conclusion; and that the accident did not actually happen in the intersection of highways 4 and 14, at all.

The record discloses that there is no dispute in the evidence that the accident occurred 44 feet north of the end of the intersection of highways 4 and 14. The evidence also is to the effect that the plaintiff had negotiated the turn into and across the intersection of highways 4 and 14 and was proceeding in his proper lane of travel to the north on highway 14 when his automobile was struck in the rear by the defendant's automobile.

In Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228, this court said: "Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence." See, also, Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

In Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561, it is said: "The rules in this state are: '* * * when a person enters an intersection of two streets or highways

he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. * * * If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. * * * Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. * * * Where he looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury.' Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596." See, also, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Ripp v. Riesland, 170 Neb. 631, 104 N. W. 2d 246.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633.

In Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758, this court said: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697.

The record discloses evidence whereby the jury could find that the defendant was operating his automobile at a rate of speed greater than was reasonable and prudent under the circumstances then existing. This evidence consists of the skidmarks, the damage to the plaintiff's automobile, the rate of speed the plaintiff was traveling at the time of the accident, the force with

which the defendant's automobile struck the plaintiff's automobile, and the evidence of the deputy sheriff to the effect that there were no indications upon highway 14 that the defendant applied the brakes of his automobile at a distance of more than 38 feet.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be, and is, affirmed.

AFFIRMED.

WENKE, J., not participating.

IN RE PETITION OF THE NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION.

GEORGE MOYER ET AL., APPELLEES, V. NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLANT.

108 N. W. 2d 89

Filed March 17, 1961. No. 34906.

Trial: Appeal and Error. When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a jury is waived, will be set aside where manifestly excessive and clearly wrong.

APPEAL from the district court for Madison County: DAYTON R. MOUNTS, JUDGE. *Reversed and remanded for a new trial.*

Kenneth M. Olds and *Donald R. Reed*, for appellant.

Moyer & Moyer and *Frederick M. Deutsch*, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, WENKE, SPENCER, and BOSLAUGH, JJ.

SIMMONS, C. J.

This is a condemnation case. The Nebraska Electric

Generation and Transmission Cooperative, Inc., a cooperative corporation, condemner, will be referred to as the defendant.

The defendant brought condemnation proceedings for a right-of-way for a 230,000 volt transmission line across lands owned by George and Earl Moyer. Their wives and their tenant are also parties. The appraisers allowed $1,500 in damages. The Moyers appealed to the district court. The Moyers will be referred to as plaintiffs.

The action was tried to the district court, a jury having been waived. It resulted in a judgment for the plaintiffs for $6,975. We reverse the judgment and remand the cause for a new trial.

Plaintiffs Moyer are the owners of the northeast quarter, the east half of the northwest quarter, and the northwest quarter of the northwest quarter of a section of Madison County land. For many years it has been farmed as a unit operation.

Defendant condemned a right-of-way for a transmission line across said land beginning at a point west of the northeast corner of the northwest quarter, thence running southeast across the northeast quarter of said land to a point east of the southwest corner of the southeast quarter. In short, the transmission line ran diagonally northwest to southeast across the approximate center of the farm.

The defendant condemned only the land taken by the poles and the right to maintain said line across said land.

There were to be five structures of two poles each set 20 feet apart carrying three wires and two shield wires. Only one of the structures is in the northwest quarter of the land. Defendant also condemned the right of ingress and egress to construct, operate, or remove said lines.

The land involved consists in part of 30 acres of pastureland, 10 acres of land used as the farmstead, and 1 acre used as a cemetery. The farmstead is in the south-

east corner of the land and about 50 rods from the transmission line. The cemetery is west thereof and in the southwest corner of the land. The cultivatable land remaining is 239 acres. The lay of the land is such that it is farmed east and west. Corn and oats appear to be the principal crops. All witnesses agree that it is a highly productive farm.

By stipulation the element of future damages was reserved and not considered.

The trial court rendered judgment for the plaintiffs for $6,975.

The two poles of each structure are set perpendicular to the transmission line direction, which makes them at an angle to east-and-west lines and at an angle to north-and-south lines.

The corn rows run east and west. Before the poles were erected on the land there was nothing to interfere with straight-line farming operations.

The testimony indicates that there are five structures on plaintiffs' land. However, the south structure is either astride the fence row or close to it. The tenant refers to three structures in his cornfield.

The north structure is in the pasture. There is no contention that it interferes in any way with the farming operations. There is evidence that the three or three and one-half structures in the fields create areas of untillable land, elliptical in form, which are about 50 feet long and 40 feet wide at the widest point. The evidence is that the farming operations are conducted by tractor power with machinery that projects wider than the tractor. The evidence indicates that the size of these tracts is based on the distance from the poles of tractor operations, and not the distance of plowing, planting, or cultivating from the poles. There is evidence that the actual land taken out of cultivation is a much smaller area than that above stated.

We are here dealing with the inconvenience of farming operations around those three and one-half uncul-

tivatable areas of land and the depreciation that their existence causes to the value of the land as a unit. We find no evidence of the amount of loss involved in the lack of production in the above areas.

There is evidence that to keep the rows straight it is necessary to make some short corn rows and turnarounds. There is no evidence of the number of such rows or the amount of land removed from production by such a process of farming, unless it is contained in the size given for the larger pieces described above. There is no evidence that the short rows or the turnarounds affect the productivity of the remainder of the tillable land. There is no evidence that the method of farm operation caused by the structures in anywise costs the plaintiffs expense or lack of revenue save for the small area involved in the three and one-half elliptical structures. The evidence affirmatively refutes any loss of productivity from the structure in the 30-acre pasture. The evidence does not show any damage to the 10 acres involved in the farmstead area or the 1 acre involved in the cemetery area.

There is evidence that the structures have been built according to approved safety practices. We find no evidence to which any finding of damages for fear of danger from that source can be allocated, although some hazard to human beings and animals exists from the presence of the line.

There is evidence that the 239 tillable acres of land are irrigable. There is no evidence of any intent to irrigate. The evidence of availability of water for irrigation is speculative and conjectural. There is evidence that if large-nozzle spray irrigation is ever undertaken that irrigation in close proximity to the lines would contain an element of danger, but that so far as this record is concerned is purely speculative.

There is evidence that weeds will grow around the structures and that it will require about 12 hours' work per year to cut them by hand two times to prevent the

spread of weed seed onto cultivated land. We find no evidence that this will either add materially to the cost of operation or reduce the revenue from the land. It would appear to be nothing more than is involved in cutting of weeds along fence rows.

Plaintiffs offered the evidence of two expert witnesses who fixed the fair market value of the land at $225 per acre before condemnation, and $190 per acre after condemnation, a difference of $35 per acre. The plaintiffs offered another witness who fixed the damage per acre at between $30 and $40 per acre.

Defendant offered the evidence of two expert witnesses who testified that the value of the land in the northwest quarter of the section had not been reduced at all, and that the value of the 160 acres of land in the northeast quarter of the section had been reduced not to exceed $15 per acre.

It appears from the pleadings that defendant will have the right of ingress and egress upon said land. No attempt appears to have been made to evaluate the damage to the plaintiffs by that right.

It does not appear by what process the trial court arrived at its finding of damages. For the purposes of this case we accept the defendant's contention that the trial court's finding has the impact of a jury's verdict. It does appear that the amount allowed the plaintiffs followed the base of the evidence and amounts to $25 per acre, which is the mean between the evidence of the plaintiffs and that of the defendant. The judgment is the equivalent of $25 per acre damage to tillable land, pasture, and farmstead.

We have held that: When the evidence is conflicting, the verdict of the jury will not be set aside unless it is clearly wrong. Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781.

Stated otherwise that rule would be: When evidence is conflicting, the verdict of a jury, or the finding of fact by a court in a law action for damages where a

jury is waived, will be set aside where manifestly excessive and clearly wrong.

As we view it, the judgment in this case is manifestly excessive and clearly wrong. We find no basis upon which it can be sustained properly.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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18. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by the Supreme Court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court. *Hungerford v. Knudsen* 125

19. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, the Supreme Court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment. It will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Hungerford v. Knudsen* 125

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29. In an action where a jury is waived, it is not within

the province of the Supreme Court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, it will be presumed that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

30. In considering the sufficiency of the evidence to sustain a judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

31. On appeal from a decision of the railway commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *City of Scottsbluff v. United Tel. Co. of the West* 229

32. The function of the Supreme Court, in determining whether or not there is evidence sufficient for submission of the case to the jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts. *Johnston v. Robertson* 324

33. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Davis v. State* 333

34. An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to the Supreme Court, it is tried de novo. *L. J. Messer Co. v. Board of Equalization* 393

35. The determination of a matter which is involved in the litigation and discussed in an opinion is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns. *Securities Acceptance Corp. v. Brown* 406

36. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the

sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *Oakdale Tel. Co. v. Wilgocki* 425

37. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Morton v. Travelers Indemnity Co.* 433
Graves v. Bednar 499

38. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defect. *Morton v. Travelers Indemnity Co.* 433

39. The purpose of assignments of error required by the rules of the Supreme Court is to advise appellee and the court of the issues on appeal which are submitted for consideration and decision. *Phillips Petroleum Co. v. City of Omaha* 457

40. A consideration by the Supreme Court of a cause on appeal is limited to errors assigned and discussed, except the court may at its option note a plain error not assigned. *Phillips Petroleum Co. v. City of Omaha* 457
Carey v. Humphries 578

41. The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings. An improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it may have influenced the verdict. *Phillips Petroleum Co. v. City of Omaha* 457

42. The reception of improper evidence in a jury trial must be considered prejudicial error unless it appears that it did not affect the result. *Phillips Petroleum Co. v. City of Omaha* 457

43. In determining whether there was error in a sentence or part of an instruction, the entire instruction and all the other instructions should be considered. The meaning should be determined from the instructions as a whole. *Phillips Petroleum Co. v. City of Omaha* 457

44. Under annexation of lands to school district statute, an appeal may be taken from the action of the

county superintendent to the district court but without providing a method. *McDonald v. Rentfrow* 479

45. Where no method of appeal is provided by statute, the appropriate procedure is a proceeding in error. *McDonald v. Rentfrow* 479

46. The district court was without jurisdiction to hear the appeal in this case except as a proceeding in error. *McDonald v. Rentfrow* 479

47. The absence of jurisdiction of the district court may be taken advantage of at any stage of the proceedings. *McDonald v. Rentfrow* 479

48. A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript. *McDonald v. Rentfrow* 479

49. In an error proceeding, the petition should contain the assignments of error, and the transcript should contain the final judgment or order sought to be reversed. *McDonald v. Rentfrow* 479

50. In a proceeding in error in the district court where a finding and judgment is the basis of the proceeding, the finding and judgment should be affirmed in the absence of a bill of exceptions containing the material and relevant evidence, and where the transcript fails to disclose any prejudicial error. *McDonald v. Rentfrow* 479

51. A transcript on appeal imports absolute verity and is the exclusive evidence of the proceedings. *McDonald v. Rentfrow* 479

52. In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent. *McDonald v. Rentfrow* 479

53. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Graves v. Bednar* 499

54. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Graves v. Bednar* 499

55. The rules of the Supreme Court require separate numbering and paragraphing in the brief of assignments of error. *Turnell v. Mahlin* 513
56. Appeals to the Supreme Court in the matter of the appointment of guardians are heard and determined de novo. *Workman v. Workman* 554
57. The selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment. Ordinarily the Supreme Court will not interfere therewith unless an abuse of discretion is shown. *Workman v. Workman* 554
58. Where the trial court gives no reason for an order determining a cause and it cannot be determined from the record, on appeal to the Supreme Court the successful party in the trial court has the duty to point out the reason or reasons which he contends justifies the decision of the trial court. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574
59. On appeal in an action for divorce, the cause is tried de novo in the Supreme Court. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838
60. When the evidence on material questions of fact in a divorce action is in irreconcilable conflict, the Supreme Court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. *Waldbaum v. Waldbaum* 625
61. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Schroeder v. Homestead Corp.* 792
62. Divorce cases are triable de novo on appeal, subject to the rule of better opportunity of trial court to judge the credibility of witnesses. *Ivins v. Ivins* 838
63. Equity case is triable de novo on appeal, subject to rule of better opportunity of trial court to judge the credibility of witnesses. *Frey v. Hauke* 852
64. In a law action when the evidence is conflicting, a verdict of the jury or a finding of fact by the court where a jury is waived will be set aside

where manifestly excessive and clearly wrong. *Moyer v. Nebraska E. G. & T. Coop.* 879

Assault and Battery.

In a prosecution for assault which involves specific intent, the intent must be proved as charged. *Blackstone v. State* 155

Assumpsit, Action of.

Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574

Attorney and Client.

1. A disciplinary proceeding is not a lawsuit with formalities of pleading. Technicalities cannot be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Disbarment proceedings are essentially civil and not criminal in character, and the recognized rules governing civil practice are applicable thereto. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
3. In a proceeding for the disbarment of an attorney, the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
4. Obligations of oath taken by a lawyer upon admission to practice stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
5. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
6. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending attorneys who indulge in practices designed to bring the courts or the profession into disrepute, to perpetrate a fraud on the courts, or to corrupt and de-

feat the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

7. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

8. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted and which are from time to time approved by the Supreme Court of this state. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

9. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or which is unworthy of public confidence constitutes a ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

10. Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

11. The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice law. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

12. In a disciplinary action against an attorney the referee is charged with the duty to determine the truth, and has the right to question witnesses on both sides of the litigation to reach a determination as to the true facts. In doing so the referee has not committed error. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

13. A contract for a contingent fee dependent upon the amount of alimony awarded in divorce suit is void as against public policy. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

14. The conduct of a lawyer before the court and with other lawyers should be characterized by candor and fairness. *State ex rel. Nebraska State Bar Assn v. Jensen* 1

15. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
16. Function of bar committees in proceedings to discipline or disbar an attorney stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
17. The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority. Statutes so providing must be strictly construed and applied. *Morton v. Travelers Indemnity Co.* 433
18. Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel. *Summerville v. North Platte Valley Weather Control Dist.* 695
19. An allowance for attorney's fees and expenses in a class action can only be made after the services have been rendered, the litigation has been successfully terminated, and a determination made that actual benefit has accrued to others in the class. *Summerville v. North Platte Valley Weather Control Dist.* 695
20. A petition for an allowance of attorney's fees and expenses in a class action is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original judgment. *Summerville v. North Platte Valley Weather Control Dist.* 695
21. A petition for an allowance of attorney's fees and expenses in a class action may be filed after the expiration of the term at which the original judgment was entered. *Summerville v. North Platte Valley Weather Control Dist.* 695
22. The right to an allowance of attorney's fees and expenses in a class action is not waived by a failure to include a request for such an allowance in the original petition. *Summerville v. North Platte Valley Weather Control Dist.* 695

Automobiles.

1. A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an auto-

mobile, based on the length of skid marks made by it when brakes were applied. *Nisi v. Checker Cab Co.* 49

2. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Nisi v. Checker Cab Co.* 49

3. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Nisi v. Checker Cab Co.* 49

4. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances. *Nisi v. Checker Cab Co.* 49

5. It is a question for the jury whether the operator of a motor vehicle equipped with headlights should have observed a pedestrian crossing a street. *Nisi v. Checker Cab Co.* 49

6. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Nisi v. Checker Cab Co.* 49

7. A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Jarosh v. Van Meter* 61

8. Doctrine of right-of-way as between driver of an automobile and a pedestrian stated. *Jarosh v. Van Meter* 61

9. Degree of care required to be exercised by a pedestrian crossing a street stated. *Jarosh v. Van Meter* 61

10. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or if it is greater than is reasonable

and prudent under the existing circumstances. *Hilferty v. Mickels* 246

11. Speed of an automobile, as a basis for negligence, may be established by circumstantial evidence. *Hilferty v. Mickels* 246
12. The observance of a practice or custom which is contrary to a statute does not prevent a motorist from being guilty of a violation of the statute. *Hilferty v. Mickels* 246
13. A motorist entering a public highway from a private driveway is not required to yield the right-of-way to an automobile being driven on the left hand side of the highway. *Hilferty v. Mickels* 246
14. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel. *Hilferty v. Mickels* 246
15. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, who is given the statutory right-of-way. *Hilferty v. Mickels* 246
16. The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances. *Hilferty v. Mickels* 246
17. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance. *Hilferty v. Mickels* 246
18. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681
19. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery. *Palmer v. McDonald* 727
20. Under the law of Missouri, a driver of a motor

vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains. *Fisher v. Chicago, B. & Q. R. R.* 804

21. Under the law of Missouri, the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law. *Fisher v. Chicago, B. & Q. R. R.* 804

22. Under the law of Missouri, failure of driver of motor vehicle to see approaching train, when under physical facts he should have seen it, was the proximate cause of a collision at crossing. *Fisher v. Chicago, B. & Q. R. R.* 804

23. Under the law of Missouri, the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver. *Fisher v. Chicago, B. & Q. R. R.* 804

24. Duty of driver of an automobile approaching a highway intersection and consideration of evidence in such a case stated. *Sekora v. Mangers* 868

25. Before a verdict can be properly directed in a highway intersection case, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Sekora v. Mangers* 868

26. The lawfulness of the speed of an automobile within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing. *Sekora v. Mangers* 868

Bail.

1. Liability of the makers of a bail bond becomes absolute when the surety thereon fails to deliver principal into custody or procure his attendance. *State v. Morse* 87

2. Bail bond is defined. *State v. Morse* 87

3. A judgment rendered on account of a forfeited bail bond may not exceed the amount of the penalty of the bond. *State v. Morse* 87

Bailments.

A bailee of a chattel for the mutual benefit of the parties or for hire, in the absence of an express contract, is liable to the bailor only for any loss resulting from the negligence of the bailee. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Bills and Notes.

1. The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt. *Kehr v. Blomenkamp* 304
2. If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon. *Grasso v. Dean* 648

Bonds.

1. A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal. *Talbott v. City of Lyons* 186
2. Requirements for creation of sinking fund for the payment of municipal bonds stated. *Talbott v. City of Lyons* 186

Brokers.

A broker is one who is engaged for others on a commission to negotiate contracts relative to property with the custody of which he has no concern. *Carey v. Humphries* 578

Burglary.

1. The material elements of the crime of possession, custody, or control of burglary tools or instruments may be proved by direct or circumstantial evidence. *Kennedy v. State* 160
2. In a prosecution for possession of burglar's tools and instruments, the ownership thereof is ordinarily immaterial. *Kennedy v. State* 160
3. In a prosecution for possession of burglar's tools or instruments, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession or

one may have actual possession and the other constructive possession. *Kennedy v. State* 160

4. The possession of burglar's instruments or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense. *Kennedy v. State* 160

5. The words "possession, custody or control," as used in statute, express an alternative of terms, definitions, or explanations of the same thing in different words. *Kennedy v. State* 160

Conflict of Laws.

A contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled public policy of this state or would work an injury to this state or its citizens. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Constitutional Law.

1. The term "due process of law" is defined. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

2. Due process of law is satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

3. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. *Wamsley v. State* 197

4. Where statutes imposing tax penalties were not uniform as to class and were discriminatory, they were violative of designated constitutional provisions. *Creigh v. Larsen* 317

5. Before a law can be determined unconstitutional, the express provision of our Constitution which the law contravenes must be pointed out. *Metropolitan Utilities Dist. v. City of Omaha* 609

6. Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of

constitutionality unless it becomes necessary to do so. *Metropolitan Utilities Dist. v. City of Omaha* 609

7. A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleadings and admissions show there is no genuine issue of fact. *Anderson v. Carlson* 741
8. The constitutionality of a law is to be tested by what the act authorizes and what may be accomplished by it. *Anderson v. Carlson* 741
9. A statute vesting an arbitrary discretion in a public officer without furnishing a guide or standard for the exercise of such discretion violates the constitutional provision prohibiting undue delegation of legislative power. *Anderson v. Carlson* 741
10. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal as to the propriety of being included therein, is an unconstitutional delegation of legislative power and a taking of property without due process of law. *Anderson v. Carlson* 741
11. The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication prohibits. *School Dist. No. 54 v. School Dist. of Omaha* 769

Continuances.

1. An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
Kennedy v. State 160
2. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case. *Kennedy v. State* 160
3. The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial. *Kennedy v. State* 160
4. In the absence of an abuse of discretion, the Supreme Court will not interfere with a trial court's

ruling on the granting of recesses and continuances on account of emotion and hysteria of a witness. *Wamsley v. State* 197

Contracts.

1. A fundamental and indispensable basis of an enforceable agreement is a meeting of the minds of the parties thereto. *Voss v. Linn* 32
2. When a written contract has been unconditionally delivered to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown. *Voss v. Linn* 32
3. Existing law becomes part of every contract. This is true not only between individuals but between individuals and the government. *Stoller v. State* 93
4. The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts. *School Dist. No. 145 v. Robertson* 176
5. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. *Podewitz v. Gering Nat. Bank* 380
6. The meaning of a written contract will be interpreted in the light of all the surrounding circumstances. *Podewitz v. Gering Nat. Bank* 380
7. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it. *Podewitz v. Gering Nat. Bank* 380
8. The practical interpretation given contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. The courts will ordinarily enforce such construction. *Podewitz v. Gering Nat. Bank* 380
9. At common law all contracts in restraint of trade were against public policy and void. *Securities Acceptance Corp. v. Brown* 406
10. A contract in partial restraint of trade may be

valid if ancillary to an actual transaction made in good faith to afford fair protection to one in whose favor the restriction is made. *Securities Acceptance Corp. v. Brown* 406

11. Restrictions against competition are not favored. An agreement which limits the right of a person to engage in a business or occupation will be strictly construed, and will not be extended by implication or construction beyond the fair or natural import of the language used. *Securities Acceptance Corp. v. Brown* 406

12. Contracts restricting competition should receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. *Securities Acceptance Corp. v. Brown* 406

13. Injunction should not be granted to enforce a negative covenant in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression. *Securities Acceptance Corp. v. Brown* 406

14. A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business. *Securities Acceptance Corp. v. Brown* 406

15. Three general requirements of a valid contract in partial restraint of trade stated. *Securities Acceptance Corp. v. Brown* 406

16. Satisfactory proof is required where injunctive relief is sought in cases dealing with the performance of personal services. *Securities Acceptance Corp. v. Brown* 406

17. Equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in a competing business, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer. *Securities Acceptance Corp. v. Brown* 406

18. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void. *Securities Acceptance Corp. v. Brown* 406

19. A contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space. *Securities Acceptance Corp. v. Brown* 406
20. Where the conditions appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced although they are only limited as to either time or space. *Securities Acceptance Corp. v. Brown.* 406
21. Where, pursuant to the terms of an executory contract, materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise. *Goedeker v. Peter Kiewit Sons' Co.* 532
22. A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired condition of the mind, may amount to duress. *Grasso v. Dean* 648
23. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails. *Grasso v. Dean* 648
24. In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Lincoln Service & Supply, Inc. v. Lorenzen* 671
25. As a general rule a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract is performed. *Dunlop Tire & Rubber Corp. v. Ryan* 820
26. The state in which the last act of a contract is performed which is necessary to the validity of the contract is the situs of the contract. *Dunlop Tire & Rubber Corp. v. Ryan* 820
27. A contract made in another state and valid under its governing laws is considered valid here, and will be enforced, unless the enforcement of the contract would violate the positive law or the settled

public policy of this state or would work an injury to this state or its citizens. *Dunlop Tire & Rubber Corp. v. Ryan* 820

28. A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Courts.

1. Function of bar committees in proceedings to discipline or disbar an attorney stated. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
3. The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination. *Erickson v. Metropolitan Utilities Dist.* 654

Criminal Law.

1. Where time is not an ingredient of a crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations. *Ware v. State* 74
2. Where the undisputed evidence shows that the criminal act charged, if committed, was not barred by the statute of limitations, a failure to instruct as to the statute of limitations is not prejudicially erroneous. *Ware v. State* 74
3. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion. *Ware v. State* 74
4. The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or

crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed. *Kennedy v. State* 160

5. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties. *Kennedy v. State* 160

6. It is proper to set out the aggravation of a criminal offense justifying heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information. *Kennedy v. State* 160

7. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute. *Kennedy v. State* 160

8. The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion. *Kennedy v. State* 160

9. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of guilt. *Kennedy v. State* 160

10. Rule as to sufficiency of circumstantial evidence in a criminal case stated. *Kennedy v. State* 160

11. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Kennedy v. State* 160

12. Rule as to when a trial court is justified in directing a verdict of not guilty in a criminal case stated. *Kennedy v. State* 160

13. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. *Kennedy v. State* 160

14. An argument by a prosecuting attorney, which is

based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct. *Kennedy v. State* 160

15. Where competent evidence is adduced to support every element of the offense charged, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Wamsley v. State* 197

16. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. *Wamsley v. State* 197

17. Where, in a criminal case, any one of several errors assigned would not in itself be sufficient to warrant a reversal, nevertheless, if all of them in the aggregate justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of the court to award a new trial. *Wamsley v. State* 197

18. A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury. When it appears to the Supreme Court that a defendant has not been accorded a fair trial, its duty is to grant a new trial. *Wamsley v. State* 197

19. When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. *Davis v. State* 333

20. In order to use evidence of a witness given at a former trial, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. *Davis v. State* 333

21. It is proper to instruct the jury that the flight of the accused is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances. *Davis v. State* 333

22. An instruction that prior conviction of the accused may be considered only for the purpose of affecting

his credibility is not prejudicial error as commenting on his credibility. *Davis v. State* 333

23. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. *Davis v. State* 333

24. Inquiry by a party of his own witness as to prior statements inconsistent with his testimony is permissible for certain specified purposes. *Welton v. State* 643

25. Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where a proper instruction has not been requested by the party complaining. *Welton v. State* 643

Damages.

1. The future pain and suffering which a jury may consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. *Hermilla v. Peterson* 365

2. Damages for permanent injury cannot be based upon speculation, probability, or uncertainty but must have as a basis therefor evidence that permanent damages are reasonably certain as a proximate result of the injury. *Hermilla v. Peterson* 365

3. It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict. *Phillips Petroleum Co. v. City of Omaha* 457

4. The rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages relating to the loss of crops and damage to land will not be allowed. *Turnell v. Mahlin* 513

5. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Deeds.

1. A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether if sufficient remains from which the intention of the parties can be ascertained. *Podewitz v. Gering Nat. Bank* 380
2. A tax deed is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. *Podewitz v. Gering Nat. Bank* 380

Descent and Distribution.

1. The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by statute. *Hughes v. de Barberi* 780
2. An estate of inheritance can be voluntarily divested only by a conveyance executed by a husband and wife while residents of this state. *Hughes v. de Barberi* 780

Divorce.

1. A contract for a contingent fee dependent upon the amount of alimony awarded in divorce suit is void as against public policy. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband toward the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by the Supreme Court. *Kramer v. Kramer* 128
3. Rule for determination of alimony in divorce case stated. *Kramer v. Kramer* 128
   Waldbaum v. Waldbaum 625
   Ivins v. Ivins 838
4. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required. *Laughrey v. Laughrey* 132
   Rush v. Rush 800
5. The corroboration relied upon in a suit for a divorce must in itself be competent evidence of

the acts and conduct asserted as a ground for divorce. *Laughrey v. Laughrey* 132

6. On an appeal to the Supreme Court in a divorce action, the cause is tried de novo. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

7. Extreme cruelty as ground for divorce is defined. *Waldbaum v. Waldbaum* 625

8. Extreme cruelty may consist of personal injury or physical violence, or it may be acts or omissions of such character as to destroy the peace of mind or impair the bodily or mental health of the one upon whom they are inflicted or toward whom they are directed, or be such as to destroy the objects of matrimony. *Waldbaum v. Waldbaum* 625

9. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

10. Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and a repetition of the offense revives the wrong condoned. *Waldbaum v. Waldbaum* 625

11. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838

12. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. *Waldbaum v. Waldbaum* 625

13. The division of property and allowance of alimony in divorce actions are always to be determined by the facts in each case. *Waldbaum v. Waldbaum* 625

14. A person is not entitled to a divorce for any cause arising in this state unless he has had an actual residence in the state for at least 1 year next before bringing the suit with a bona fide intention of making this state his permanent home, or unless the marriage was solemnized in this state and the applicant shall have remained herein from the time

of marriage to the filing of the petition. *Rush v. Rush* 800

15. By statute, no person is entitled to a divorce for any cause arising out of this state unless one of the parties shall have resided within the state for at least 2 years next preceding the bringing of the action. *Rush v. Rush* 800

16. By statute, a person serving in the armed forces who has been continuously stationed in any military base or installation for the period of 1 year is deemed a resident in good faith of this state and the county where such military base or installation is located. *Rush v. Rush* 800

17. In the determination of whether or not a ground for divorce has been established, it is a general rule that acts asserted as grounds for divorce must be corroborated. *Ivins v. Ivins* 838

18. The charge of adultery must be clearly established by competent testimony before a decree of divorce may be granted on that ground. *Ivins v. Ivins* 838

19. In an action for divorce on the ground of adultery it is not necessary to show an overt act of adultery but the evidence of facts and circumstances must be such as to lead the mind of a just and reasonable person to the conclusion of guilt. *Ivins v. Ivins* 838

20. The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized. *Ivins v. Ivins* 838

21. Divorce cases are triable de novo on appeal, subject to the rule of better opportunity of trial court to judge the credibility of witnesses. *Ivins v. Ivins* 838

22. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. *Ivins v. Ivins* 838

23. The fact that a decree of divorce may be granted to a husband on grounds other than adultery does not bar the wife from the right to alimony and division of property. *Ivins v. Ivins* 838

Duress.

1. A disguised threat of criminal punishment may be as effective for the purpose of inciting fear as a direct statement, and if it produces the desired

condition of the mind, may amount to duress. *Grasso v. Dean* 648
2. Any wrongful influence designedly exerted by an interested party and producing a condition of mind that deprives the other party of the exercise of his free will may amount to duress and invalidate a contract signed while the influence prevails. *Grasso v. Dean* 648
3. Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided. *Grasso v. Dean* 648

Elections.

Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate an election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote. *Talbott v. City of Lyons* 186

Electricity.

1. An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury. *Roos v. Consumers Public Power Dist.* 563
2. Among the circumstances to be considered in an action for damages arising out of a break in a wire carrying electricity is the well-known dangerous character of electricity and the inherent risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger. *Roos v. Consumers Public Power Dist.* 563
3. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. *Roos v. Consumers Public Power Dist.* 563
4. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may rea-

sonably be expected to be. *Roos v. Consumers Public Power Dist.* 563

5. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur, does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire. *Roos v. Consumers Public Power Dist.* 563

6. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, notwithstanding injury has resulted from contact with a fallen wire, the electric company as a matter of law has not failed in the performance of its duty. *Roos v. Consumers Public Power Dist.* 563

7. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought. *Roos v. Consumers Public Power Dist.* 563

8. In the performance of its duty to exercise due care and skill, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence. *Roos v. Consumers Public Power Dist.* 563

9. It is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies would constitute them insurers against injury. *Roos v. Consumers Public Power Dist.* 563

10. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects. *Roos v. Consumers Public Power Dist.* 563

11. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom. *Roos v. Consumers Public Power Dist.* 563

12. When an electric company conducts its business with due care and diligence, it ordinarily is not liable for a defective condition of its appliances of

which it has no notice. *Roos v. Consumers Public Power Dist.* 563

13. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach. *Roos v. Consumers Public Power Dist.* 563
14. Where fatigue fracture of an electric line could only be discovered upon examination under a high-powered microscope, liability for improper inspection did not attach. *Roos v. Consumers Public Power Dist.* 563
15. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist. *Roos v. Consumers Public Power Dist.* 563

Eminent Domain.

1. A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option. *Phillips Petroleum Co. v. City of Omaha* 457
2. A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation. *Phillips Petroleum Co. v. City of Omaha* 457
3. Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters but only to the general welfare. *Phillips Petroleum Co. v. City of Omaha* 457
4. A landowner must recover in the condemnation proceeding all his damages caused by the taking of land which may arise on account of the proper construction and the future operation of an improvement for which the land was taken. *Phillips Petroleum Co. v. City of Omaha* 457
5. The purchase of land for a right-of-way in lieu of condemnation carries with it all of the incidents

of eminent domain insofar as damages by reason of construction are concerned. *Clary v. State* 691

6. For all injuries which arise on account of the proper construction or future operation of an improvement, an adjoining landowner must be compensated in the original condemnation proceedings. *Clary v. State* 691

7. The owner of adjoining land is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but also for all which would result from a proper construction, improvement, and maintenance of the highway, taking into consideration, where channel changes are involved, the contingency of erosion. *Clary v. State* 691

Equity.

1. Laches is an equitable doctrine and it does not result from the mere passage of time. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

2. Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1

3. The act of filing a bill in equity is sufficient as an exercise of an option when accompanied by the payment into court of the purchase price fixed by the option agreement. *Standard Reliance Ins. Co. v. Schoenthal* 490

4. A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

5. The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

6. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable

to the optionee resulting in prejudice to the rights of optioner has occurred since the right to exercise the option arose. *Standard Reliance Ins. Co. v. Schoenthal* 490

Estoppel.

1. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. *Talbott v. City of Lyons* 186
2. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Talbott v. City of Lyons* 186
3. The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel. *Talbott v. City of Lyons* 186
4. The doctrine of equitable estoppel is frequently applied to prevent a person from maintaining inconsistent positions. Acceptance of benefits, with knowledge of the facts, will create an estoppel. *Securities Acceptance Corp v. Brown* 406

Evidence.

1. A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied. *Nisi v. Checker Cab Co.* 49
2. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Nisi v. Checker Cab Co.* 49
3. Circumstantial evidence concerning an accident may be sufficient to overcome direct evidence as to the

speed of an automobile involved therein. *Hilferty v. Mickels* 246

4. The presumption against death by suicide is prima facie only and rebuttable. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that death was caused by suicide. The burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. *Haith v. Prudential Ins. Co.* 281
5. When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. *Davis v. State* 333
6. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Davis v. State* 333
7. While evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. *Baer v. Schaap* 347
8. When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion. *Baer v. Schaap* 347
9. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Baer v. Schaap* 347
10. Inquiry by a party of his own witness as to prior statements inconsistent with his testimony is permissible for certain specified purposes. *Welton v. State* 643
11. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negli-

gently is generally competent evidence. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

12. Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

13. The testimony of an alleged paramour that he had adulterous relations with a wife whose husband is seeking a divorce on the ground of adultery should be received with caution and carefully scrutinized. *Ivins v. Ivins* 838

False Pretenses.

1. The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud. *Harger v. State* 342

2. A conviction for obtaining money by false pretenses may not be sustained in the absence of proof of false pretense and of intent to cheat and defraud. *Harger v. State* 342

Fines.

1. Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common schools in the respective subdivision wherein it accrues. *School Dist. No. 54 v. School Dist. of Omaha* 769

2. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county. *School Dist. No. 54 v. School Dist. of Omaha* 769

Guaranty.

An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limita-

tions in Nebraska. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Guardian and Ward.

1. Appeals to the Supreme Court in the matter of the appointment of guardians are heard and determined de novo. *Workman v. Workman* 554
2. A proceeding for the appointment of a guardian is a probate matter. *Workman v. Workman* 554
3. By statute, a minor over the age of 14 years has a right to nominate his own guardian. Ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion, it comes to the conclusion that the person nominated is disqualified to act as such. *Workman v. Workman* 554
4. The selection and appointment of guardians is a matter within the discretion of the county court making such selection and appointment. Ordinarily the Supreme Court will not interfere therewith unless an abuse of discretion is shown. *Workman v. Workman* 554
5. If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right. *Workman v. Workman* 554
6. Where a minor has, for a number of years, been in the custody and care of a certain person who is competent and otherwise a suitable person to perform the duties of a guardian, the appointment of such person as guardian would be in the best interest of the minor. *Workman v. Workman* 554

Health.

1. The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. *State v. Noll* 831
2. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society. *State v. Noll* 831
3. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires. *State v. Noll* 831

Highways.

1. A motorist entering a public highway from a private driveway is not required to yield the right-of-way to an automobile being driven on the left hand side of the highway. *Hilferty v. Mickels* 246
2. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel. *Hilferty v. Mickels* 246
3. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, who is given the statutory right-of-way. *Hilferty v. Mickels* 246
4. The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances. *Hilferty v. Mickels* 246
5. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance. *Hilferty v. Mickels* 246
6. One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Palmer v. McDonald* 727

Husband and Wife.

1. The method by which a married man or woman can be divested of his or her estate of inheritance in the property of the other is provided by statute. *Hughes v. de Barberi* 780
2. An estate of inheritance can be voluntarily divested only by a conveyance executed by such husband and wife while residents of this state. *Hughes v. de Barberi* 780
3. A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the convey-

ance by the wife without the husband joining in the deed. *Hughes v. de Barberi* 780
4. A court may decree specific performance of an agreement to sell real estate against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree. *Hughes v. de Barberi* 780
5. Where the purchaser fails to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied. *Hughes v. de Barberi* 780

Injunction.

1. Injunction should not be granted to enforce a negative covenant in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression. *Securities Acceptance Corp. v. Brown* 406
2. Satisfactory proof is required where injunctive relief is sought in cases dealing with the performance of personal services. *Securities Acceptance Corp. v. Brown* 406
3. Injunction is the appropriate remedy for the protection against unlawful interference with flow of surface waters in a well-defined channel. *Turnell v. Mahlin* 513
4. The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

Insurance.

1. Where the word "permission" or "consent" appears in the omnibus clause of an insurance policy without definition, it is construed to include implied permission. This implication may be a product of the present or past conduct of the insured. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212
2. No liability attaches under a policy of insurance for accidental injury where automobile is being used without the express or implied consent of the insured. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212
3. An insured may have a written policy reformed to

conform to the contract actually made, and acceptance of policy without examination thereof until after loss does not prevent reformation. *Rodine v. Iowa Home Mutual Cas. Co.* 263

4. An insured cannot disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance. *Rodine v. Iowa Home Mutual Cas. Co.* 263
5. The presumption against death by suicide is prima facie only and rebuttable. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced showing that death was caused by suicide. The burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. *Haith v. Prudential Ins. Co.* 281
6. Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict. *Haith v. Prudential Ins. Co.* 281
7. The parties to an insurance contract may make the contract in any legal form they desire. In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. *Morton v. Travelers Indemnity Co.* 433
8. An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made. *Morton v. Travelers Indemnity Co.* 433
9. The language of an insurance contract should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. *Morton v. Travelers Indemnity Co.* 433

10. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, the one favorable to the insured will be adopted. *Morton v. Travelers Indemnity Co.* 433
11. The clause, "collapse of the building or any part thereof," appearing in an insurance policy means a sudden or unusual shrinking, settling, or falling of the building or any part thereof, or a loss of firm support, rigidity, or connection with other parts. The wall or walls or other parts of the building need not have actually fallen down or together into an irregular mass. *Morton v. Travelers Indemnity Co.* 433
12. The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority. Statutes so providing must be strictly construed and applied. *Morton v. Travelers Indemnity Co.* 433
13. Under the statutes which were effective and controlling in this case, in order to effect the cancellation of a policy of insurance by the insurer, it was necessary that there be a tender back to the insured of the paid but unearned premium. *Sculley v. Sullivan* 795

Joint Adventures.

1. To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. *Carey v. Humphries* 578
2. A joint adventure is defined. *Carey v. Humphries* 578
3. Necessary elements of a joint adventure stated. *Carey v. Humphries* 578
4. The existence of a joint adventure is a question of fact. The burden of establishing it is on the litigant who asserts its existence. More evidence is required to prove the existence of a joint adventure if alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. *Carey v. Humphries* 578
5. Persons engaged in a common enterprise by way of a joint adventure or other similar association of persons stand in a fiduciary relation and are bound

by strict standards of good conduct and fair dealing the one to the other. *Carey v. Humphries* 578

6. If a joint adventure or a like association of persons is formed for the acquisition, ownership, or development of certain defined property, its scope will not be extended so as to forbid the acquisition, ownership, or development by one of the parties for his own benefit of property not owned by or concerned in the enterprise and which is outside of its scope. *Carey v. Humphries* 578

Joint Tenancy.

A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common. *Hughes v. de Barberi* 780

Judgments.

1. Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. The summary judgment process as defined by statute is a special proceeding. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
3. The process prescribed by the Summary Judgments Act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
4. A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
5. When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212
6. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue re-

mains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

7. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

8. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

9. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

10. Requisities for entry of a judgment or order nunc pro tunc stated. *Bower v. Butcher* 452

11. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded. *Bower v. Butcher* 452

12. A nunc pro tunc order must conform to and be no broader in its terms than the one originally rendered. *Bower v. Butcher* 452

13. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth. *Bower v. Butcher* 452

14. Where there is an actual controversy between the parties and justiciable issues are presented by all the interested parties, who are parties in the proceedings, the Uniform Declaratory Judgments Act is applicable. *Metropolitan Utilities Dist. v. City of Omaha* 609

15. A petition for an allowance of attorney's fees and expenses in a class action is an independent proceeding, supplemental to the original proceeding, and not a request for a modification of the original

judgment. *Summerville v. North Platte Valley Weather Control Dist.* 695

16. A petition for an allowance of attorney's fees and expenses in a class action may be filed after the expiration of the term at which the original judgment was entered. *Summerville v. North Platte Valley Weather Control Dist.* 695

17. A motion for summary judgment is a proper pleading to raise the question of constitutionality if the pleading and admissions show there is no genuine issue of fact. *Anderson v. Carlson* 741

18. When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant. *Bushey v. French* 809

19. When a question of fact is once determined on its merits, that question is settled so far as the litigants are concerned and it may not be relitigated between the same parties. *Frey v. Hauke* 852

Landlord and Tenant.

1. A provision in a lease of real estate giving to the the lessee the right to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extension or amplification of the estate granted by the lease. *Phillips Petroleum Co. v. City of Omaha* 457

2. The volume of business done on any given leasehold has a direct relation to the value of the leasehold as volume is directly connected with the success of the business and diminution of business means decrease in volume. *Phillips Petroleum Co. v. City of Omaha* 457

Larceny.

In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. *Davis v. State* 333

Liens.

1. A positive legislative enactment prescribing conditions essential to the existence and preservation of

a statutory lien may not be disregarded. *County Board of Platte County v. Breese* 37
2. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to a case not within the terms of the statute. *County Board of Platte County v. Breese* 37
3. The existence of a lien securing an original loan furnishes a presumption that a renewal was not a discharge of the original lien where the renewal is not secured. *Kehr v. Blomenkamp* 304

Limitations of Actions.
1. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Dunlop Tire & Rubber Corp. v. Ryan* 820
2. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. *Dunlop Tire & Rubber Corp. v. Ryan*..... 820
3. A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy and will not be enforced by the courts of this state. *Dunlop Tire & Rubber Corp. v. Ryan* 820
4. An action instituted in Nebraska on a written guaranty executed in and to be performed in Nebraska is subject to the provisions of the statute of limitations in Nebraska. *Dunlop Tire & Rubber Corp. v. Ryan* 820

Mandamus.
1. Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. *State ex rel. Krieger v. Board of Supervisors* 117
2. The proper practice in a mandamus action is to issue the writ in the name of the state upon the relation of the party or parties claiming the relief

sought. *State ex rel. Krieger v. Board of Supervisors* 117

3. The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit. The court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. *State ex rel. Krieger v. Board of Supervisors* 117

4. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. *State ex rel. Krieger v. Board of Supervisors* 117

5. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued. No other pleadings are permitted. *State ex rel. Krieger v. Board of Supervisors* 117

6. If no answer is filed to an alternative writ then a peremptory writ must be allowed. *State ex rel. Krieger v. Board of Supervisors* 117

7. Procedure on issuance of an alternative writ of mandamus stated. *State ex rel. Krieger v. Board of Supervisors* 117

8. If no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered. *State ex rel. Krieger v. Board of Supervisors* 117

9. The ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus. *State ex rel. Krieger v. Board of Supervisors* 117

10. A writ of mandumus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. *State ex rel. Krieger v. Board of Supervisors* 117

11. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. *State ex rel. Krieger v. Board of Supervisors* 117

Master and Servant.

1. One of the implied terms of a contract of employment is that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment. An employee who has left his employment is under an implied obligation not to use trade secrets or other confidential information which he has acquired in the course of his employment. *Securities Acceptance Corp. v. Brown* 701
2. In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers to which an ordinarily prudent man would refuse to subject himself, he is guilty of contributory negligence, particularly where he has created the danger. *Gamble v. Gamble* 826
3. Where an employee, capable of understanding and discretion, fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious, he will ordinarily be deemed to have assumed the risk, and no liability attaches to the employer. *Gamble v. Gamble* 826
4. A servant cannot undertake the performance of a service where the danger is so obvious that injury could be anticipated, even in obedience to the command of the master, and then maintain a cause of action for injuries sustained. The servant will be deemed to have assumed the risk. *Gamble v. Gamble* 826

Mines and Minerals.

1. Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, a change thereafter made in the Constitution of Nebraska would not prevent the state from being bound to carry out the contract. *Stoller v. State* 93
2. Acceptance and recording of a deed containing a mineral reservation which was unauthorized and invalid will not estop a vendee of school lands from demanding a proper deed. *Stoller v. State* 93

Money Received.

An action for money had and received is an action at law. *Barker v. Wardens & Vestrymen of St. Barnabas Church* 574

Mortgages.

If the consideration for a note and mortgage is the suppression of a criminal prosecution, the transaction is illegal and void and no recovery can be had thereon. *Grasso v. Dean* 648

Motor Carriers.

1. The railway commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
2. Where the evidence is in conflict in a hearing before the railway commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
3. An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
4. Controlling questions in determining the issuance of a certificate of public convenience and necessity stated. *Young v. Morgan Drive Away, Inc.* 784
5. The declared policy of the Motor Carrier Act is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and prevent unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Young v. Morgan Drive Away, Inc.* 784
6. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first and at all times, to serve the interests of the public. *Young v. Morgan Drive Away, Inc.* 784

Municipal Corporations.

1. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one

class of the public as against another class. *Talbott v. City of Lyons* 186

2. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers have done. *Talbott v. City of Lyons* 186

3. A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal. *Talbott v. City of Lyons* 186

4. Requirements for creation of sinking fund for the payment of municipal bonds stated. *Talbott v. City of Lyons* 186

5. The owner of property abutting on a street is not entitled as against the public to access to his land at all points on the boundary between it and a street although entire access cannot be denied him. The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. *Phillips Petroleum Co. v. City of Omaha* 457

6. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue or abandon the same when it leaves a lot owner in a worse condition that he would have been if the city had not constructed such sewers or drains. *Young v. City of Scribner* 544

7. Where a city of the second class constructs sewers or drains, it is bound to use ordinary care to keep such sewers or drains in proper condition and repair. It will be held liable for damages to property resulting from failure to do so. *Young v. City of Scribner* 544

8. A city is liable for negligence of its agents in obstructing a gutter or drain resulting in damage to private property. *Young v. City of Scribner* 544

9. Neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. *Young v. City of Scribner* 544

10. Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a

nuisance, or be required to abate one already created by it. *Young v. City of Scribner* 544
11. A public sewer system is a public utility. A municipality may, by ordinance, fix and collect reasonable service charges for the use thereof upon a proper basis; and in doing so, it relates to a matter of statewide concern. *Metropolitan Utilities Dist. v. City of Omaha* 609
12. Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. *Metropolitan Utilities Dist. v. City of Omaha* 609
13. Nature of powers of municipal corporation stated. *Metropoliton Utilities Dist. v. City of Omaha* 609
14. A public sewer system is a public utility the same as a water system. The Legislature has the right to delegate to a municipal corporation the authority to manage and operate the same or any phase thereof. *Metropolitan Utilities Dist. v. City of Omaha* 609
15. A regulation promulgated by municipal ordinance which provides that the water supply be shut off to residents delinquent in the payment of sewer charges is valid and not an unreasonable or arbitrary regulation. *Metropoliton Utilities Dist. v. City of Omaha* 609
16. A metropolitan water district, organized pursuant to statute, is a body corporate and possesses all of the usual powers of a corporation for public purposes. *Erickson v. Metropolitan Utilities Dist.* 654
17. A metropolitan water district is empowered to exercise any and all powers that are possessed by or which may be granted to cities and villages by the general statutes of this state for the construction and extension of waterworks. *Erickson v. Metropolitan Utilities Dist.* 654
18. A metropolitan water district in the conduct of its affairs functions in the nature of a private enterprise for the convenience, advantage, and benefit of the area in which it functions, the inhabitants thereof, and the property owners therein. *Erickson v. Metropolitan Utilities Dist.* 654
19. Power and authority of directors of a metropolitan water district with respect to rates and charges for water service stated. *Erickson v. Metropolitan Utilities Dist.* 654
20. Where a water district furnishes water to the public

at large it may classify users and charge different rates to the different classes provided the charges are reasonable and not discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

21. Those engaged in serving water to the public generally may not make unreasonable and unjust discrimination either in service or rates among their patrons. *Erickson v. Metropolitan Utilities Dist.* 654
22. A metropolitan water district having power to adopt rules and regulations is required to enact reasonable requirements, the reasonableness of which may be inquired into in a full hearing de novo in the courts. *Erickson v. Metropolitan Utilities Dist.* 654
23. The question of whether or not a metropolitan water district has acted unreasonably and arbitrarily in the performance of its functions in the matter of service rendered and rates charged is one of those which is properly subject to judicial review and examination. *Erickson v. Metropolitan Utilities Dist.* 654
24. The injunctive process is available to a user of water against a water district furnishing water to the public generally to prevent the enforcement of a rate which is discriminatory. *Erickson v. Metropolitan Utilities Dist.* 654

Negligence.

1. Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence. *Nisi v. Checker Cab Co.* 49
2. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossing at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances. *Nisi v. Checker Cab Co.* 49
3. It is a question for the jury whether the operator of a motor vehicle equipped with headlights should have observed a pedestrian crossing a street. *Nisi v. Checker Cab Co.* 49
4. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and pru-

dence required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Nisi v. Checker Cab Co.* 49

5. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Jarosh v. Van Meter* 61

6. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. *Jarosh v. Van Meter* 61

7. Doctrine of proximate cause, as affected by the intervening agency of others, stated. *Jarosh v. Van Meter* 61

8. Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause. *Jarosh v. Van Meter* 61

9. Definition of contributory negligence stated. *Jarosh v. Van Meter* 61

10. A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Jarosh v. Van Meter* 61

11. Doctrine of right-of-way as between driver of an automobile and a pedestrian stated, *Jarosh v. Van Meter* 61

12. Degree of care required to be exercised by a pedestrian crossing a street stated. *Jarosh v. Van Meter* 61

13. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. *Buie v. Beamsley* 181
Wrona v. Schrawger 814
Sekora v. Mangers 868

14. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or if it is greater than is reason-

able and prudent under the existing circumstances. *Hilferty v. Mickels* 246
15. Speed of an automobile, as a basis for negligence, may be established by circumstantial evidence. *Hilferty v. Mickels* 246
16. The observance of a practice or custom which is contrary to a statute does not prevent a motorist from being guilty of a violation of the statute. *Hilferty v. Mickels* 246
17. Doctrine of causal connection between negligence complained of and injury stated. *Baer v. Schaap* 347
18. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. *Baer v. Schaap* 347
19. A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable. *Morton v. Travelers Indemnity Co.* 433
20. Negligence may be proved by circumstantial evidence. All the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Graves v. Bednar* 499
Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc. 681
21. Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonably prudent man would not do. *Turnell v. Mahlin* 513
22. In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied. *Roos v. Consumers Public Power Dist.* 563
23. An electric company maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. It is not an insurer against injury. *Roos v. Consumers Public Power Dist.* 563
24. Among the circumstances to be considered in an action for damages arising out of a break in a wire carrying electricity is the well-known dangerous character of electricity and the inherent

risk of injury to persons or property when it is uncontrolled. Therefore, the care used must be commensurate with and proportionate to that danger. *Roos v. Consumers Public Power Dist.* 563

25. The duty of due care with which an electric company is charged consists not only in the installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particular case. *Roos v. Consumers Public Power Dist.* 563

26. One dealing with electricity of high voltage must, because of its highly dangerous character, exercise the utmost degree of care and skill known in the operation of its business to prevent injury to persons or property at any place where they may reasonably be expected to be. *Roos v. Consumers Public Power Dist.* 563

27. The mere fact that an electric line breaks, unless the facts bring it within the rule of res ipsa loquitur, does not establish negligence so as to render an electric company liable for damages to property coming in contact with a fallen wire. *Roos v. Consumers Public Power Dist.* 563

28. If an electric company is shown, without conflict in the evidence, to have used the utmost degree of care and skill, notwithstanding injury has resulted from contact with a fallen wire, the electric company as a matter of law has not failed in the performance of its duty. *Roos v. Consumers Public Power Dist.* 563

29. The festooning of the insulation on electric wires or an abnormal sagging of such wires is not evidence of negligence to support a recovery where such conditions in no way contributed to the injury for which recovery is sought. *Roos v. Consumers Public Power Dist.* 563

30. In the performance of its duty to exercise due care and skill, an electric company must anticipate and guard against events which may reasonably be expected to occur, and a failure in this respect is negligence. *Roos v. Consumers Public Power Dist.* 563

31. It is not negligence to fail to anticipate and guard against happenings which would not have arisen except under exceptional or unusual circumstances. To impose such a liability upon electric companies

would constitute them insurers against injury. *Roos v. Consumers Public Power Dist.* 563
32. In the performance of its duty to exercise the utmost care and skill in maintaining its electric wires, an electric company is required to make reasonable inspections to detect defects. *Roos v. Consumers Public Power Dist.* 563
33. An electric company must make reasonable and proper inspections of its appliances with such frequency as appears reasonably necessary and use due diligence to discover and remedy defects to the end that injury may not result therefrom. *Roos v. Consumers Public Power Dist.* 563
34. When an electric company conducts its business with due care and diligence, it ordinarily is not liable for a defective condition of its appliances of which it has no notice. *Roos v. Consumers Public Power Dist.* 563
35. In the absence of evidence of a practical and customary means of discovering an inherent defect in a power line or a defect which is imperceptible to the human eye, and of which the electric company has no notice, liability ordinarily does not attach. *Roos v. Consumers Public Power Dist.* 563
36. Where fatigue fracture of an electric line could only be discovered upon examination under a high-powered microscope, liability for improper inspection did not attach. *Roos v. Consumers Public Power Dist.* 563
37. An electric company is liable only for its own negligence and where the proof does not establish a pleaded act of negligence, either of omission or commission, the basis for a recovery does not exist. *Roos v. Consumers Public Power Dist.* 563
38. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance of acts under similar circumstances like those which are alleged to have been done negligently is generally competent evidence. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681
39. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a

matter of law, and precludes recovery. *Palmer v. McDonald* 727

40. One who attempts to cross a street between intersections without looking is guilty of such negligence as will bar a recovery as a matter of law. If he testifies that he did look, it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. *Palmer v. McDonald* 727
41. To constitute actionable negligence, an act must be a proximate cause of the accident and the ensuing injuries. *Palmer v. McDonald* 727
42. Rules to be applied in the application of the comparative negligence statute stated. *Sayers v. Witte* 750
43. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence. *Sayers v. Witte* 750

New Trial.

1. When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial. *Law v. Gilmore* 112
2. A new trial does not involve an original examination of issues, but only re-examination. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148
3. When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict. *Haith v. Prudential Ins. Co.* 281
4. Where verdict is contrary to the evidence, it should be vacated. A request for judgment notwithstanding the verdict should in that event be sustained if motion therefor has been timely made. *Haith v. Prudential Ins. Co.* 281
5. A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. *Graves v. Bednar* 499
6. Errors sufficient to cause the granting of a new

trial must be errors prejudicial to the rights of the unsuccessful party. *Graves v. Bednar* 499
7. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Graves v. Bednar* 499

Nuisances.

Like an individual, a municipality may, in a proper case, be enjoined from creating or maintaining a nuisance, or be required to abate one already created by it. *Young v. City of Scribner* 544

Officers.

1. A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office. *Bass v. County of Saline* 538
2. In discharging the duty of fixing salaries of clerks and employees in his office the county officer must not act arbitrarily, capriciously, or unreasonably. *Bass v. County of Saline* 538
3. The expression, "with the approval of the county board," authorizes the county board to approve or disapprove the salary fixed by the officer, but such county board must not act arbitrarily, capriciously, or unreasonably in so doing. *Bass v. County of Saline* 538
4. Where a county officer has fixed the salary of a clerk or employee, and the evidence is undisputed that the salary so fixed is fair and reasonable for the service rendered, a disallowance or reduction of the salary claim by the county board is arbitrary and unreasonable. *Bass v. County of Saline* 538

Parent and Child.

1. In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. *Waldbaum v. Waldbaum* 625
Ivins v. Ivins 838
2. In a case where the fixing of the custody of a minor child is concerned, the wishes of the

child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. *Waldbaum v. Waldbaum* 625

3. A father's legal duty to support his child ceases when the child becomes of age, especially when the record is void of any reason for such support. *Waldbaum v. Waldbaum* 625
4. Where a parent is induced to execute an instrument by threats and fear of criminal punishment of a child, the instrument is the result of duress and the contract may be voided. *Grasso v. Dean* 648
5. In awarding the custody of minor children of tender years the best interests of the children usually require that they be given into the care and custody of the mother if she is a suitable and fit person. *Ivins v. Ivins* 838

Partnership.

1. To constitute a partnership or joint adventure in a legal sense, there must be an agreement to share the profits and losses, and an absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. *Carey v. Humphries* 578
2. The burden of proof is upon the plaintiff to prove an oral contract of partnership for a fixed term by clear, satisfactory, and unequivocal evidence. *Frey v. Hauke* 852
3. The fact that a partnership incurred debts and charged its assets for their payment is no proof of an agreement that the partnership shall continue until its debts are paid. The debts may be paid as well after as before dissolution. *Frey v. Hauke* 852
4. A managing partner who acquiesces in the matter of depreciation relating to the partnership business as set up by an accountant is in no position to complain about such depreciation. *Frey v. Hauke* 852
5. If a partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the partnership after dissolution, he is not entitled to share in the profits earned. *Frey v. Hauke* 852
6. The good will of a partnership consists of every possible advantage acquired by it in carrying on its business. *Frey v. Hauke* 852
7. The chief elements of value in partnership good

will are continuity of name, place, and organization. *Frey v. Hauke* 852

Penalties.

1. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. *Johnson Fruit Co v. Story* 310
2. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Johnson Fruit Co. v. Story* 310
3. A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting taxable property from his return may not properly question the constitutionality of the act. *Johnson Fruit Co. v. Story* 310
4. Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax. *Creigh v. Larsen* 317
5. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith. *Creigh v. Larsen* 317
6. Since the imposition of a penalty is not the assessment of a tax, the principle of uniformity as to class required by the Constitution has no application thereto. *Creigh v. Larsen* 317
7. Sections of the statute provide a statewide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state. *Creigh v. Larsen* 317
8. Statute imposing a penalty at tangible property rate for failure to return intangible property for taxation was not uniform as to class and discriminatory. *Creigh v. Larsen* 317
9. Where fines, penalties, and license money arise and are paid in under rules, by-laws, or ordinances of cities, villages, precincts, or other subdivisions less than a county, such money shall be appropriated and used exclusively for the support of the common

schools in the respective subdivision wherein it accrues. *School Dist. No. 54 v. School Dist. of Omaha* 769

10. Where fines, penalties, and license money arise and are paid in under the general laws of the state, such money shall be paid over to the counties respectively wherein the same may be levied or imposed, and appropriated exclusively to the support of common schools in the several school districts of such county. *School Dist. No. 54 v. School Dist. of Omaha* 769

Pleading.

1. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Stoller v. State* 93
2. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Stoller v. State* 93
3. In order that a recovery may be had in an action, the pleadings and the proof must agree. *School Dist. No. 145 v. Robertson* 176
4. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree. *School Dist. No. 145 v. Robertson* 176
Lincoln Service & Supply, Inc. v. Lorenzen 671
5. The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts. *School Dist. No. 145 v. Robertson* 176
6. There can be no recovery if there is a material variance between the allegations and the proof. The allegations and proof must agree. *Talbott v. City of Lyons* 186
7. The prayer of a petition is not a part of the allegations of fact constituting the cause of action. Where the facts state a cause of action which are supported by the evidence, the court will grant the proper relief, although it may not conform to the relief prayed for. *Standard Reliance Ins. Co. v. Schoenthal* 490
8. The prayer of a petition is no part of the essen-

tial pleading, it tenders no issue, and neither adds to nor takes from the evidence required of either party. *Standard Reliance Ins. Co. v. Schoenthal* 490

9. A prayer for general relief in equity is as broad as the pleadings and the equitable powers of the court. *Standard Reliance Ins. Co. v. Schoenthal* 490

10. In an action on an express contract the defendant may show under a general denial that the contract differed in terms from that pleaded, or that no contract was in fact made. *Lincoln Service & Supply, Inc. v. Lorenzen* 671

11. A petition showing on its face that the cause of action stated therein is barred by the statute of limitations is subject to general demurrer. *Dunlop Tire & Rubber Corp. v. Ryan* 820

12. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. *Dunlop Tire & Rubber Corp. v. Ryan* 820

13. Where a party answers after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling. *Ivins v. Ivins* 838

Principal and Agent.

1. The apparent authority or agency for which a principal is liable must be traceable to him. A principal is only liable for that appearance of authority or agency caused by himself. *Rodine v. Iowa Home Mutual Cas. Co.* 263

2. Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against a principal to prove its existence or extent. *Rodine v. Iowa Home Mutual Cas. Co.* 263

3. A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent. *Rodine v. Iowa Home Mutual Cas. Co.* 263

4. It is an essential requirement of a valid and effective ratification of an unauthorized act by the principal that he have complete knowledge of the un-

authorized act and of all matters related to it. *Rodine v. Iowa Home Mutual Cas. Co.* 263

Public Lands.

1. The rights of a lessee of school lands are determined by the law as it was at the time the lease was made. The lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation. *Stoller v. State* 93
2. Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, a change thereafter made in the Constitution of Nebraska would not prevent the state from being bound to carry out the contract. *Stoller v. State* 93
3. Acceptance and recording of a deed containing a mineral reservation which was unauthorized and invalid will not estop a vendee of school lands from demanding a proper deed. *Stoller v. State* 93

Public Service Commissions.

1. The railway commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
2. Where the evidence is in conflict in a hearing before the railway commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
3. An order of the railway commission which ignores the undisputed or admitted facts and a proper application of the law to such facts is arbitrary and unreasonable. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
4. Rulings of the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the railway commission, and by the Supreme Court on appeal therefrom, when dealing with comparable situations in intrastate commerce. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78
5. An increase in the rates of a common carrier of

intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78

6. An order of the railway commission that is arbitrary and unreasonable will be vacated and set aside on appeal to the Supreme Court. *L. E. Whitlock Truck Service v. Shippers Oil Field Traffic Assn.* 78

7. Rate tariffs and rules of interpretation thereof are exempted from requirements of filing statute. *City of Scottsbluff v. United Tel. Co. of the West* 229

8. The power of the railway commission to fix the rates to be charged by common carriers is legislative and not judicial in character. *City of Scottsbluff v. United Tel. Co. of the West* 229

9. The railway commission may authorize a telephone company to impose upon its subscribers within the territorial limits of a city a pro rata charge to reimburse it for an occupation tax levied by the city. *City of Scottsbluff v. United Tel. Co. of the West* 229

10. On appeal from a decision of the railway commission involving the rates to be charged by common carriers, it is presumed that the rates prescribed are just, reasonable, and not arbitrary. *City of Scottsbluff v. United Tel. Co. of the West* 229

11. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited. *City of Scottsbluff v. United Tel. Co. of the West* 229

12. On appeal from a decision of the railway commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *City of Scottsbluff v. United Tel. Co. of the West* 229

13. Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the railway commission and not the courts. *City of Scottsbluff v. United Tel. Co. of the West* 229

14. Where it is shown that an order of the railway commission is within the scope of the powers vested in it, is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission. *City of Scottsbluff v. United Tel. Co. of the West* 229

15. The railway commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done. *Oakdale Tel. Co. v. Wilgocki* 425

16. On appeal to the Supreme Court from an order of the railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. *Oakdale Tel. Co. v. Wilgocki* 425

17. Courts should, upon review, interfere with administrative and legislative action of the railway commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Bower v. Butcher* 452

18. An order of the railway commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest. *Young v. Morgan Drive Away, Inc.* 784

19. Controlling questions in determining the issuance of a certificate of public convenience and necessity stated. *Young v. Morgan Drive Away, Inc.* 784

20. The declared policy of the Motor Carrier Act is, in part, to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and prevent unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices. *Young v. Morgan Drive Away, Inc.* 784

21. The primary object of the regulation of public utilities by the railway commission is not to establish a monopoly or to guarantee the security of investment in public service corporations, but first and at all times, to serve the interests of the public. *Young v. Morgan Drive Away, Inc.* 784

Public Utilities.

1. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience and necessity. *Oakdale Tel. Co. v. Wilgocki* 425
2. A public sewer system is a public utility the same as a water system. The Legislature has the right to delegate to a municipal corporation the authority to manage and operate the same or any phase thereof. *Metropolitan Utilities Dist. v. City of Omaha* 609

Railroads.

1. It is the law of Missouri that a railroad track of itself is a sign and warning of danger, requiring one who is about to cross the track to look and listen for approaching trains before driving onto the railroad track. *Fisher v. Chicago, B. & Q. R. R.* 804
2. Under the law of Missouri, a driver of a motor vehicle, particularly one familiar with a railroad crossing and about to drive thereon, must exercise the highest degree of care to keep a lookout and to observe and watch for the approach of trains. *Fisher v. Chicago, B. & Q. R. R.* 804
3. Under the law of Missouri, the driver of a motor vehicle, who has a clear view along a railroad track and who drives upon the track in daylight when by looking he could have seen an approaching train, is guilty of negligence as a matter of law. *Fisher v. Chicago, B. & Q. R. R.* 804
4. Under the law of Missouri, failure of driver of motor vehicle to see approaching train, when under physical facts he should have seen it, was the proximate cause of a collision at crossing. *Fisher v. Chicago, B. & Q. R. R.* 804
5. Under the law of Missouri, the negligence of the driver of the motor vehicle in such a situation is the proximate cause of the collision, and the railroad company is not liable in damages for the death of the driver. *Fisher v. Chicago, B. & Q. R. R.* 804

Rape.

1. In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime charged and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be

corroborated on material points by other evidence to sustain a conviction of the accused. *Ware v. State* 74

2. It is not essential in a prosecution for rape that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense, but it is indispensible that she be corroborated as to facts and circumstances which tend to support her testimony as to the principal fact in issue. *Ware v. State* 74
3. It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and to determine the verdict solely upon the evidence. *Wamsley v. State* 197
4. In a prosecution for rape, it is the duty of the trial court to take necessary steps to remove prejudice arising from misconduct of the father of the prosecutrix. *Wamsley v. State* 197
5. Where incidents occur during the trial of a rape case which tend to create sympathy for the prosecutrix and hostility toward the defendant, it is the duty of the court, on request, to instruct the jury to disregard such incidents and to arrive at the verdict solely upon the evidence. A failure to give such an instruction under such circumstances ordinarily constitutes prejudicial error. *Wamsley v. State* 197

Reformation of Instruments.

An insured may have a written policy reformed to conform to the contract actually made, and acceptance of policy without examination thereof until after loss does not prevent reformation. *Rodine v. Iowa Home Mutual Cas. Co.* 263

Sales.

1. Generally, in the absence of any contrary intention or agreement, the risk of loss follows the title. *Goedeker v. Peter Kiewit Sons' Co.* 532
2. In order to have a passing of title to personal property, there must be a delivery and acceptance thereof within the intent and meaning of the parties' agreement. *Goedeker v. Peter Kiewit Sons' Co.* 532
3. Where, pursuant to the terms of an executory con-

tract, materials are to be furnished and labor is to be performed in placing the same in usable condition, the contract is not divisible as between the material and labor so as to pass title to the materials before the required labor is performed, unless, by the terms of the contract, it is evident the parties intended otherwise. *Goedeker v. Peter Kiewit Sons' Co.* 532

Schools and School Districts.

1. The powers and duties imposed upon county superintendents of schools by annexation of lands to school district statute are legislative in character. *McDonald v. Rentfrow* 479
2. The exercise of the powers and duties delegated to county superintendents by annexation of lands to school district statute are mandatory if the conditions exist which are described therein. *McDonald v. Rentfrow* 479
3. Before the powers and duties prescribed in annexation of lands to school district statute may be exercised, a county superintendent must give at least 15 days' notice to the legal residents of the district, which notice may be by mail or by publication in a newspaper of general circulation in the area. *McDonald v. Rentfrow* 479
4. Under annexation of lands to school district statute, an appeal may be taken from the action of the county superintendent to the district court but without providing a method. *McDonald v. Rentfrow* 479
5. A proceeding in error from the action of a county superintendent must come to the district court on a petition in error and a transcript. *McDonald v. Rentfrow* 479
6. In the case of a proceeding in error from the action of a county superintendent to the district court where no error is found, it is the duty of the district court to affirm the action of the county superintendent and of the clerk of the district court to certify the decision to the county superintendent. *McDonald v. Rentfrow* 479

Specific Performance.

1. Where the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its

terms, and in all respects offers to do equity, the basis exists for the granting of such relief. *Standard Reliance Ins. Co. v. Schoenthal* 490

2. A court may decree specific performance of an agreement to sell real estate against the wife alone, if the other party consents thereto; the husband's marital rights in such real estate not being affected by the decree. *Hughes v. de Barberi* 780

3. Where the purchaser fails to indicate by evidence or pleading that he will accept the deed of the wife without the husband joining therein, specific performance of the agreement will ordinarily be denied. *Hughes v. de Barberi* 780

States.

The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract. *Stoller v. State* 93

Statutes.

1. A legislative act operates prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *County Board of Platte County v. Breese* 37

2. If a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon. The conditions so imposed qualify and are an integral part of the statute and must be fully complied with in the manner therein prescribed. *County Board of Platte County v. Breese* 37

3. A legislative body which creates a right of action has power to determine the conditions under and the time within which it must be brought. *County Board of Platte County v. Breese* 37

4. Purpose of proviso in a statute stated, and rule of construction as to last expression in case of conflicting provisions outlined. *Stoller v. State* 93

5. Existing law becomes part of every contract. This is true not only between individuals but between individuals and the government. *Stoller v. State* 93

6. In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by

the Legislature thereon. *Hueftle v. Eustis Cemetery Assn.* 293

7. The enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated, and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases. *Hueftle v. Eustis Cemetery Assn.* 293
8. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions. *Johnson Fruit Co. v. Story* 310
9. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute. *Johnson Fruit Co. v. Story* 310
10. Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former. *Johnson Fruit Co. v. Story* 310
11. Where the latter of two statutes passed at the same session of the Legislature does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands. *Johnson Fruit Co. v. Story* 310
12. The Legislature may make a reasonable classification for purposes of legislation, but the classification must rest upon real differences in situations and circumstances. To be valid the law must operate uniformly and alike upon every member of the class so designated. *Creigh v. Larsen* 317
13. A provision in a statute that a county officer shall have necessary clerks and assistants at such salaries as he may determine, with the approval of the county board, invests the county officer with the duty of fixing the salaries of clerks and employees in his office. *Bass v. County of Saline* 538
14. Ordinances and statutes are presumed to be constitutional; unconstitutionality must be clearly established; and courts will not pass on a question of constitutionality unless it becomes necessary to do so. *Metropolitan Utilities Dist. v. City of Omaha* 609

15. Validity of statutes and ordinances is favored and when susceptible of two constructions the one holding such statute or ordinance valid will ordinarily be followed. *Metropolitan Utilities Dist. v. City of Omaha* 609

16. In case of doubt as to the meaning of a statute resort may be had to the title of the act as an aid to discover the legislative intent, but not to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. *Metropolitan Utilities Dist. v. City of Omaha* 609

17. Rules for construction of statute of doubtful meaning stated. *Metropolitan Utilities Dist. v. City of Omaha* 609

18. The power of classification rests with the Legislature. This power cannot be interfered with by the courts unless it is clearly apparent that the Legislature has, by an artificial and baseless classification, attempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation. *Metropolitan Utilities Dist. v. City of Omaha* 609

19. In the construction of statutes, when the word "may" appears, permissive or discretionary action is presumed. When the word "shall" appears, mandatory or ministerial action is presumed. *Anderson v. Carlson* 741

20. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. *Anderson v. Carlson* 741

21. A statute vesting an arbitrary discretion in a public officer without furnishing a guide or standard for the exercise of such discretion violates the constitutional provision prohibiting undue delegation of legislative power. *Anderson v. Carlson* 741

22. A statute permitting private individuals to fix the boundaries of a district to be supported by taxation, without affording property owners the opportunity to be heard by a competent tribunal as to the propriety of being included therein, is an unconstitutional delegation of legislative power and a taking of property without due process of law. *Anderson v. Carlson* 741

23. The Legislature can legalize no act which it could not have authorized before it was done. In other words, it cannot validate that which the Constitution either in express terms or by necessary implication

prohibits. *School Dist. No. 54 v. School Dist. of Omaha* 769

24. In general, the word "may" used in statutes will be given ordinary meaning unless it would manifestly defeat the object of the statutes, and when used in a statute is permissive, discretionary, and not mandatory. *State v. Noll* 831

25. In defining the term "discretion" when invoked as a guide to judicial action, it means a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. *State v. Noll* 831

26. The Sexual Psychopath Act was intended to permit the removal of a sexual psychopath from society until he is cured or is no longer a menace to the safety of others. *State v. Noll* 831

27. The Sexual Psychopath Act is not intended as a legal bypass whereby a sexual psychopath, after a relatively short stay in a mental institution, could be released to continue as a menace to society. *State v. Noll* 831

28. The intent of the Sexual Psychopath Act is to require confinement until such time as the offender is not likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his uncontrolled and uncontrollable desires. *State v. Noll* 831

Subrogation.

A payment of a liability of another by one who is under no legal or moral obligation to pay the same does not entitle the volunteer to subrogation in the absence of an agreement to that effect. *Freeport Motor Cas. Co. v. McKenzie Pontiac, Inc.* 681

Taxation.

1. Taxation statute imposing severe penalty construed and held applicable to a situation where a taxpayer fails to make a return of personal property subject to taxation or omits taxable property from his return, and not applicable to a voluntary return made later than the time fixed by statute. *Johnson Fruit Co. v. Story* 310

2. A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting

taxable property from his return may not properly question the constitutionality of the act. *Johnson Fruit Co. v. Story* 310

3. Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax. *Creigh v. Larsen* 317
4. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith. *Creigh v. Larsen* 317
5. Since the imposition of a penalty is not the assessment of a tax, the principle of uniformity as to class required by the Constitution has no application thereto. *Creigh v. Larsen* 317
6. Taxpayers who fail to return property for taxation may properly be designated by the Legislature as a class for the purpose of enacting legislation dealing with their failure to return property for taxation. *Creigh v. Larsen* 317
7. Sections of the statute provide a statewide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state. *Creigh v. Larsen* 317
8. Statute imposing a penalty at tangible property rate for failure to return intangible property for taxation was not uniform as to class and discriminatory. *Creigh v. Larsen* 317
9. Where statutes imposing tax penalties were not uniform as to class and were discriminatory, they were violative of designated constitutional provisions. *Creigh v. Larsen* 317
10. A tax deed is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. *Podewitz v. Gering Nat. Bank* 380
11. The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value. *L. J. Messer Co. v. Board of Equalization* 393
12. The presumption obtains that a board of equalization

has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action. The presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the board becomes one of fact based upon evidence unaided by presumption. *L. J. Messer Co. v. Board of Equalization* 393

13. A taxpayer is required by statute to furnish information as to his federal income tax return. The information so furnished does not constitute the conclusive actual value of the property to be taxed. *L. J. Messer Co. v. Board of Equalization* 393

14. A formula is provided by statute to be followed by the taxing authorities in taxing property. Such formula is applicable to personal property as well as real estate, and should be considered by the taxing authorities in taxing either real or personal property. *L. J. Messer Co. v. Board of Equalization* 393

Telecommunications.

1. The railway commission may authorize a telephone company to impose upon its subscribers within the territorial limits of a city a pro rata charge to reimburse it for an occupation tax levied by the city. *City of Scottsbluff v. United Tel. Co. of the West* 229

2. A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience and necessity. *Oakdale Tel. Co. v. Wilgocki* 425

Tenancy in Common.

A contract by joint tenants to sell real estate in joint tenancy destroys the joint tenancy in the real estate. If the contract of sale is silent as to the relationship of the vendors as owners of the contract, they own it as tenants in common. *Hughes v. de Barberi* 780

Torts.

1. Doctrine of proximate cause, as affected by the intervening agency of others, stated. *Jarosh v. Van Meter* 61

2. Where there are two or more possible causes of injury, for one or more of which defendant is not

responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. *Baer v. Schaap* 347

Trial.

1. Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. Rule for consideration of motion for directed verdict stated. *Nisi v. Checker Cab Co.* 49
   Buie v. Beamsley 181
   Johnston v. Robertson 324
   Wrona v. Schrawger 814
3. Duty of court in passing on motion for a judgment notwithstanding the verdict stated. *Jarosh v. Van Meter* 61
   Baer v. Schaap 347
4. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Law v. Gilmore* 112
5. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained. *Law v. Gilmore* 112
6. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Law v. Gilmore* 112
7. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by the Supreme Court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court. *Hungerford v. Knudsen* 125
8. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, the Supreme Court will examine the record to ascertain if the

pleadings state a cause of action or defense which support the judgment. It will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. *Hungerford v. Knudsen* 125

9. A final order within the meaning of appeal statute is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

10. An exception to the general rule that only final orders are appealable appears in statute authorizing appeal from entry of judgment notwithstanding the verdict. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

11. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

12. An order sustaining a motion for new trial is in its essence interlocutory. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

13. The interlocutory character of an order sustaining a motion for new trial is not destroyed by the fact that by the terms of statute authorizing entry of judgment notwithstanding the verdict, an appeal may be taken therefrom. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

14. A trial is the examination before a competent tribunal, according to law, of facts or law put in issue in a cause, for the purpose of determining such issue. *Otteman v. Interstate Fire & Cas Co., Inc.* 148

15. The process prescribed by the Summary Judgments Act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial. *Otteman v. Interstate Fire & Cas. Co., Inc.* 148

16. Rule as to sufficiency of circumstantial evidence in a criminal case stated. *Kennedy v. State* 160

17. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is in-

sufficient to support a finding of guilt beyond a reasonable doubt. *Kennedy v. State* 160
18. Rule as to when a trial court is justified in directing a verdict of not guilty in a criminal case stated. *Kennedy v. State* 160
19. In order that a recovery may be had in an action, the pleadings and the proof must agree. *School Dist. No. 145 v. Robertson* 176
20. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree. *School Dist. No. 145 v. Robertson* 176
Lincoln Service & Supply, Inc. v. Lorenzen 671
21. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. *Buie v. Beamsley* 181
Graves v. Bednar 499
Wrona v. Schrawger 814
Sekora v. Mangers 868
22. There can be no recovery if there is a material variance between the allegations and the proof. The allegations and proof must agree. *Talbott v. City of Lyons* 186
23. Where competent evidence is adduced to support every element of the offense charged, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt. *Wamsley v. State* 197
24. It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and to determine the verdict solely upon the evidence. *Wamsley v. State* 197
25. In a prosecution for rape, it is the duty of the trial court to take necessary steps to remove prejudice arising from misconduct of the father of the prosecutrix. *Wamsley v. State* 197
26. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence. *Wamsley v. State* 197
27. When a proceeding under the Uniform Declaratory

Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

28. Where the record in a civil case shows that a law action was tried to the court without a jury and discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, the Supreme Court will presume that a jury was waived. *State Farm Mutual Automobile Ins. Co. v. Kersey* 212

29. When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict. *Haith v. Prudential Ins. Co.* 281

30. Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict. *Haith v. Prudential Ins. Co.* 281

31. Where verdict is contrary to the evidence, it should be vacated. A request for judgment notwithstanding the verdict should in that event be sustained if the motion therefor has been timely made. *Haith v. Prudential Ins. Co.* 281

32. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

33. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

34. The court examines the evidence on motion for summary judgment, not to decide any issue of fact

presented, but to discover if any real issue of fact exists. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

35. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. *Ingersoll v. Montgomery Ward & Co., Inc.* 297

36. It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Johnston v. Robertson* 324

37. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. *Johnston v. Robertson* 324

38. Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. *Davis v. State* 333

39. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. *Davis v. State* 333

40. It is proper to instruct the jury that the flight of the accused is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances. *Davis v. State* 333

41. An instruction that prior conviction of the accused may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility. *Davis v. State* 333

42. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. *Davis v. State* 333

43. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Davis v. State* 333

44. Duty of court stated as to preliminary determina-

tion of sufficiency of evidence to require submission of case to a jury. *Baer v. Schaap* 347

45. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Baer v. Schaap* 347

46. Rule for determination of motion for directed verdict stated. *Morton v. Travelers Indemnity Co.* 433

47. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court. *Morton v. Travelers Indemnity Co.* 433

48. A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable. *Morton v. Travelers Indemnity Co.* 433

49. Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *Morton v. Travelers Indemnity Co.* 433
Graves v. Bednar 499

50. Instructions must be considered and construed together. If they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defect. *Morton v. Travelers Indemnity Co.* 433

51. It is the duty of the trial court to inform the jury as to each item or element of damage it should consider in reaching its verdict. *Phillips Petroleum Co. v. City of Omaha* 457

52. The proof on the trial of a jury case should be confined to legal evidence tending to prove or disprove an issue made by the pleadings. An improper matter submitted to the jury for its consideration by the trial court is prejudicial error if it

may have influenced the verdict. *Phillips Petroleum Co. v. City of Omaha* 457
53. The reception of improper evidence in a jury trial must be considered prejudicial error unless it appears that it did not affect the result. *Phillips Petroleum Co. v. City of Omaha* 457
54. In determining whether there was error in a sentence or part of an instruction, the entire instruction and all the other instructions should be considered. The meaning should be determined from the instructions as a whole. *Phillips Petroleum Co. v. City of Omaha* 457
55. In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Graves v. Bednar* 499
56. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission. Unless this is done, the judgment will not ordinarily be reversed for such defects. *Graves v. Bednar* 499
57. The reading by the official reporter of the testimony of a witness examined on the trial is within the spirit if not within the letter of a statute requiring the court to give its recollection of the testimony, since the reporter's notes of the testimony are liable to be more accurate than the judge's recollection of what was testified to. *Graves v. Bednar* 499
58. Proof of misconduct on the part of a jury to avoid a verdict must be of such a character that prejudice may be presumed. Evidence of misconduct which is to the advantage of the party complaining does not afford a basis for a new trial. *Graves v. Bednar* 499
59. In an action for negligence based on specified acts of negligence the plaintiff, in order to recover, must establish the specific negligence alleged and the doctrine of res ipsa loquitur cannot be applied. *Roos v. Consumers Public Power Dist.* 563
60. Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where a proper instruction has not been requested by the party complaining. *Welton v. State* 643
61. Rule for consideration of motion for directed verdict

or for judgment notwithstanding the verdict stated. *Palmer v. McDonald* 727

62. There is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. *Palmer v. McDonald* 727

63. It is the duty of the Supreme Court to sustain motion for judgment notwithstanding the verdict where the trial court improperly overruled motion for directed verdict at close of all the evidence. *Palmer v. McDonald* 727

64. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. *Palmer v. McDonald* 727

65. The question of the existence of negligence or contributory negligence is for a jury where different minds may reasonably draw different conclusions from the evidence as to the existence of negligence or contributory negligence. *Sayers v. Witte* 750

66. In a civil action tried to a jury, in which either party is entitled to recover money from the adverse party, the jury is required to assess the amount of the recovery in its verdict. *Bushey v. French* 809

67. When the question of liability is for the jury and plaintiff has adduced evidence of damages for injuries sustained, a verdict for the plaintiff in the amount of "$ no money" is contrary to law and insufficient to sustain a judgment for the defendant. *Bushey v. French* 809

68. The assessment of "$ no money" in a verdict nullifies its effect as a verdict in favor of plaintiff. Being neither a verdict for the plaintiff nor a verdict for the defendant, it is in effect no verdict at all. *Bushey v. French* 809

69. It is the duty of the trial court to point out defects in a verdict to the jury and send it back to the jury with directions to return a verdict in accordance with law and the instructions of the court. *Bushey v. French* 809

70. If there is any evidence which will sustain a finding for the party having the burden of proof in a

cause, the trial court may not disregard it and direct a verdict against him. *Wrona v. Schrawger* 814
71. Where a party answers after an adverse ruling on his motion or demurrer and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in the ruling. *Ivins v. Ivins* 838
72. Duty of driver of an automobile approaching a highway intersection and consideration of evidence in such a case stated. *Sekora v. Mangers* 868
73. Before a verdict can be properly directed in a highway intersection case, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Sekora v. Mangers* 868
74. In a law action when the evidence is conflicting, a verdict of the jury or a finding of fact by the court where a jury is waived will be set aside where manifestly excessive and clearly wrong. *Moyer v. Nebraska E. G. & T. Coop.* 879

Trusts.

1. The burden of proof is on one seeking to establish the existence of a constructive trust to do so by evidence that is clear, satisfactory, and convincing. *Carey v. Humphries* 578
2. A constructive trust is defined. *Carey v. Humphries* 578
3. Each case in which it is sought to establish a constructive trust must be determined from its facts and circumstances. *Carey v. Humphries* 578
4. The cardinal rule applicable to the construction of a written instrument creating a trust is to determine the intent of the settlor and to give effect thereto if it is not in conflict with law. *Conway v. County of Adams* 677
5. Rules of construction of trusts are intended for use in doubtful cases when language used is not clear, but these rules have no application when the language used clearly expresses the settlor's intent. *Conway v. County of Adams* 677
6. Where an instrument creating a trust declares the trust estate to be personal property, and the declaration does not conflict with law, it has binding force and effect. *Conway v. County of Adams* 677

Vendor and Purchaser.

1. A merchantable title is a title which a man of rea-

sonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser. *Podewitz v. Gering Nat. Bank* 380

2. An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the optionee that he has the right to buy the property according to the terms and conditions of the option. *Phillips Petroleum Co. v. City of Omaha* 457

3. An option to purchase real estate does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated. *Phillips Petroleum Co. v. City of Omaha* 457

4. A holder of a mere option to purchase land which is sought to be condemned is not entitled to any compensation to be paid therefor nor to any damages by reason of the severance of a part of the land from the remainder of it, the subject of the option. *Phillips Petroleum Co. v. City of Omaha* 457

5. A provision in a lease of real estate giving to the lessee the right to purchase the land upon conditions therein stated is no part of the lessee's leasehold estate in the land and it creates in the lessee no estate in the land. It is only a contract right and is not an extention or amplification of the estate granted by the lease. *Phillips Petroleum Co. v. City of Omaha* 457

6. A holder of an option to purchase land being condemned, whether contained in a lease in which the holder is lessee or evidenced by separate writing, has no interest in the land which entitles him to compensation. *Phillips Petroleum Co. v. City of Omaha* 457

7. The exercise of an option to purchase real estate, in order to be effectual, must be identical with the terms of the option agreement and unconditional. *Standard Reliance Ins. Co. v. Schoenthal* 490

8. An option holder cannot enforce an option to purchase real estate until he elects to and binds himself to perform it, thereby giving mutuality to optioner's offer to sell by optionee's acceptance of it. *Standard Reliance Ins. Co. v. Schoenthal* 490

9. The act of filing a bill in equity, within the time for exercising the option, declaring an acceptance and election is sufficient when accompanied by the payment into court of the purchase price fixed by the

option agreement. *Standard Reliance Ins. Co. v. Schoenthal* 490

10. Where the optionee prays for specific performance of the option agreement and makes an unconditional offer to exercise the option in accordance with its terms, and in all respects offers to do equity, the basis exists for the granting of such relief. *Standard Reliance Ins. Co. v. Schoenthal* 490
11. A demand for a warranty deed contrary to the terms of the option agreement is not an acceptance or exercise of the option, but is a counteroffer. *Standard Reliance Ins. Co. v. Schoenthal* 490
12. The claim that the exercise of the option by optionee was ineffectual in that optionee failed to tender payment of installments on an assessment for a public improvement is without merit where the optionee, by pleading in an equity action properly brought, unqualifiedly exercises the option and unconditionally agrees to comply with its terms as determined by the court. *Standard Reliance Ins. Co. v. Schoenthal* 490
13. Where by a bill in equity an optionee exercises his option to purchase and prays for the specific performance of the option agreement, the doctrine of laches is not available as a defense where the suit is brought within the time fixed by the option agreement for its exercise and no delay chargeable to the optionee resulting in prejudice to the rights of optionor has occurred since the right to exercise the option arose. *Standard Reliance Ins. Co. v. Schoenthal* 490
14. A party to a written contract for the sale of her real estate, not a homestead, will not be excused from performance because her husband did not sign the agreement and refused to join in the deed, if the other party is willing to accept the conveyance by the wife without the husband joining in the deed. *Hughes v. de Barberi* 780

Waters.

1. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters. *Turnell v. Mahlin* 513
2. Rule for determination of liability for deflection

and repulsion of surface waters stated. *Turnell v. Mahlin* 513

3. Where surface water flows in a well-defined course, whether the course be ditch, swale, or drain in its primitive condition, the flow cannot be arrested or interfered with to the injury of neighboring proprietors. *Turnell v. Mahlin* 513
4. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue or abandon the same when it leaves a lot owner in a worse condition that he would have been if the city had not constructed such sewers or drains. *Young v. City of Scribner* 544
5. Where a city of the second class constructs sewers or drains, it is bound to use ordinary care to keep such sewers or drains in proper condition and repair. It will be held liable for damages to property resulting from failure to do so. *Young v. City of Scribner* 544
6. A city is liable for negligence of its agents in obstructing a gutter or drain resulting in damage to private property. *Young v. City of Scribner* 544
7. Neither the owner of land nor a municipal corporation has any right to collect waters and discharge them upon the lands of another in a greater quantity than what would have reached the property by natural drainage. *Young v. City of Scribner* 544

Weapons.

As a general rule, absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant. A weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by defendant. *Kennedy v. State* 160

Wills.

1. The court, in construing a will, is required to give effect to the true intent of the testator to the extent it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law. *Gaughen v. Gaughen* 763
2. A patent ambiguity in a will is one which appears upon the face of it. Such an ambiguity must be removed by interpretation according to legal principles and not by evidence, and the intention of

the testator must be found within the four corners of the will. *Gaughen v. Gaughen* 763

3. A bequest or devise to the children of two or more persons is distributed per capita unless a different intention is otherwise indicated in the will. *Gaughen v. Gaughen* 763

Witnesses.

1. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
2. While the plaintiff who calls defendant as a witness cannot impeach his character for veracity generally, the plaintiff may show that the whole or any part of what defendant has sworn to is untrue either by his own examination and the improbability of his story or by other contradictory evidence material to the case. *State ex rel. Nebraska State Bar Assn. v. Jensen* 1
3. In order to use evidence of a witness given at a former trial, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. *Davis v. State* 333

Workmen's Compensation.

1. On appeal to the Supreme Court in a workmen's compensation case the cause is considered de novo upon the record. *Knaggs v. City of Lexington* 135
2. Where the evidence is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others. *Knaggs v. City of Lexington* 135
3. A claimant must prove, in order to recover under the Workmen's Compensation Act, that an accident occurred arising out of and in the course of employment which accident produced injury that re-

sulted in disability or death. *Knaggs v. City of Lexington* 135

4. In order to recover in a workmen's compensation case, there must be a causal connection between an accident suffered by the claimant and the cause of his disability. *Knaggs v. City of Lexington* 135
5. Disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated as where the same result follows directly from visible violence done to the physical structure of the body. *Knaggs v. City of Lexington* 135
6. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135
7. Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135
8. An accident, within the meaning of the statute, is construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury. *Knaggs v. City of Lexington* 135
9. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute. *Knaggs v. City of Lexington* 135
10. Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident compensable under the Workmen's Compensation Act. *Knaggs v. City of Lexington* 135
11. The rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to

compensation; that is, it does not permit a court to award compensation when the required proof is lacking. *Knaggs v. City of Lexington* 135

12. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Knaggs v. City of Lexington* 135

13. Statutory time for filing claim and commencing action does not apply until the employee has knowledge that the accident has caused a compensable disability. *Webb v. Consumers Cooperative Assn.* 758
Plambeck v. Natkin & Co. 774

14. The Workmen's Compensation Act is to be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Plambeck v. Natkin & Co.*..... 774